



Coastal Climate Change Advisory Committee

Victorian Planning and Environmental
Law Association (VPELA)

Reference Group Briefing Report

January 2010

Contact

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The views expressed in this document are not to be read as the views of the membership of VPELA, its Board or any individual Board member. This document has been prepared to assist an Advisory Committee appointed by the Minister for Planning. The purpose of the document is to provide the Advisory Committee with a survey of the areas of law relevant to its task – a reference document for the preparation of the Committee’s discussion paper. This document is presented as a compilation and synthesis of analyses carried out by various authors who are members of VPELA, each drawing on their own skill, knowledge and research. While all care has been taken in compiling the final document to ensure accuracy and to remain faithful to the contributions of the various authors, this document is not intended as a treatise on the relevant areas of law, nor is it intended for use as legal advice.

1. **Introduction**

- 1.1 The Department of Planning and Community Development (**DPCD**) commissioned VPELA to prepare a briefing paper to assist the Advisory Committee (**Committee**) in the preparation of its discussion paper.
- 1.2 The purpose of the briefing paper was to record for the Committee's benefit a thorough overview of the legal issues that arise in the context of climate change affecting coastal locations. The overview is intended to assist the Committee in the formulation of ideas and the identification of issues that require further explanation, investigation and analysis.
- 1.3 As the index reveals, the areas of law traversed in this discussion paper are numerous and diverse.
- 1.4 VPELA responded to DPCD's commission by establishing a working party. VPELA called for expressions of interest among its membership – particularly that part of the membership with legal skills and training. The response was overwhelming. The working party established discrete areas of inquiry in answer to the terms of reference contained in the brief to VPELA.
- 1.5 These discrete subject areas were then allocated to those lawyers and other professionals who volunteered to assist in the process of research, analysis and writing. The brief from DPCD always demanded an extensive survey of relevant existing and developing law.
- 1.6 The resultant briefing paper is not legal advice per se, but is an attempt to compile a thorough survey of the planning and environmental law regime within which climate change issues are emerging generally and specifically in relation to coastal areas. The briefing paper serves as a useful index to the legislative and policy framework and also provides an insight into the ways in which this problem is being or may be addressed in other States and jurisdictions internationally.
- 1.7 VPELA hopes that as the Committee grapples with the complex issues associated with planning for climate change that this briefing paper will be a useful tool. As stated, this briefing is intended to aid the preparation of the discussion paper by the Committee. It is not intended to be an exhaustive statement on all the topics addressed. VPELA has indicated that it will undertake a further more detailed examination, analysis or research of any topic covered by this briefing paper to assist the Committee in its further deliberations.

2. International obligations, legislative framework and government initiatives

2.1 Background

2.2 There is no Commonwealth legislation relating to property and planning issues specifically arising from coastal climate change as these areas are generally outside the Commonwealth's constitutional¹ powers. The Commonwealth's constitutional powers are constrained in terms of the reach of the Commonwealth's jurisdiction in the coastal zone.

2.3 The so-called "offshore constitutional settlements" (**OCS**)² between the States and the Commonwealth delineate the roles and responsibilities between the Commonwealth and the States and Territories. Generally, the States and the Northern Territory have primary responsibility over coastal waters— namely, from the territorial sea base line out to three nautical miles. This means that the States and Territories have primary jurisdiction for what is often considered the coastal zone with day-to-day decision making being the responsibility of local governments.

2.4 In addition, the *Heads of Agreement on Commonwealth and State Roles and Responsibilities for the Environment*³, signed in 1997 by the Council of Australian Governments (**COAG**) and representatives of local governments, sets out Commonwealth and State responsibilities in the coastal zone. The Commonwealth role is limited to waters outside those waters under State control pursuant to the OCS, except where formal Commonwealth/State management arrangements are in place (e.g. specific fisheries) or where waters are under Commonwealth direct management (e.g. the Great Barrier Reef Marine Park).

¹ Commonwealth of Australia Constitution Act 1900 ("the Constitution") See: http://www.austlii.edu.au/au/legis/cth/consol_act/c167/

² This agreement was made in 1979 between the Commonwealth and the States following a series of High Court cases involving disputes about the extent of Commonwealth powers to legislate in the marine areas. For a useful summary of the agreement, see Crommelin, Dr. M (1982) *Offshore Mining and Petroleum: Constitutional Issues* in **Australian Mining and Petroleum Law Journal** 1981 3(1) 191, at 214 (Appendix), extracted from Commonwealth Attorney-General's Department Offshore Constitutional Settlements: A Milestone in co-operative federalism (AGPS, 1981)

³ See: <http://www.environment.gov.au/epbc/publications/coag-agreement/index.html>

2.5 A report by the House of Representatives Standing Committee on Climate Change⁴ recently recommended all levels of government work together to create a national coastal-zone agreement which would include⁵:

- (1) upgrading the building code to reflect the changing environment;
- (2) a National Coastal Zone Policy;
- (3) a National Catchment-Coast-Marine Management Program;
- (4) a Coastal Sustainability Charter; and
- (5) a National Coastal Advisory Council.

2.6 The Committee also recommended that the Australian Law Reform Commission undertake an early inquiry into the liability facing public authorities and property owners in respect of climate change⁶.

This chapter briefly outlines some of the existing legislation and national initiatives that may impact upon coastal planning and property development.

By way of overview, the national debate and legislative focus of the Commonwealth Government has been focussed on greenhouse gas and developing an emissions trading scheme in an attempt to arrest planetary warming, rather than legislating for some of the consequences of climate change such as sea level rise in coastal areas. In relation to the consequences of climate change, much of the work of the Commonwealth Government has been directed to non legislative policy development.

Specific Climate Change Legislation

2.7 *Carbon Pollution Reduction Scheme Bill (CPRS Bill)*

- (1) The CPRS Bill does not have any direct impact upon property and planning issues arising from coastal climate change.

⁴ See: <http://www.aph.gov.au/house/committee/ccwea/coastalzone/report.htm>

⁵ *Ibid* see Chapter 6, Recommendations 44-47

⁶ *Ibid* see Chapter 4, Recommendation 23

- (2) The CPRS Bill sets up the proposed emissions trading scheme. Broadly, the Scheme covers all six Kyoto Protocol gases: carbon dioxide, methane, nitrous oxide and three categories of synthetic greenhouse gases. It will cover emissions of these gases from the production of stationary energy, industrial processes and transport (but not international transport). The Scheme will apply to fugitive emissions, such as methane emissions from black coal mining and emissions from flaring during the extraction and processing of oil and gas.
- (3) The CPRS Bill provides compensation for certain "emissions-intensive trade-exposed industries"⁷ associated with the costs of compliance with the Scheme.
- (4) The CPRS Bill does not address compensation for property owners or developers potentially affected by coastal climate change.

2.8 ***National Greenhouse and Energy Reporting Act 2007 (Cth) (NGER Act)***

- (1) Like the CPRS Bill, the NGER Act does not have any direct impact upon property and planning issues arising from coastal climate change.
- (2) The NGER Act provides for reporting by corporations on their emission of greenhouse gases, greenhouse gas projects, energy consumption and energy production. The Minister for Climate Change is empowered to stipulate conditions and rating systems in relation to emissions, reduction, removal, offsets, production and consumption measurements.
- (3) Annual reporting is compulsory for all registered corporations on the national database. Registration is compulsory if a corporation is the ultimate Australian holding company of a corporate group and the corporate group or facilities under the operational control of the corporate group meet one or more of the thresholds for greenhouse gas emissions, energy production or energy consumption specified in the legislation.

⁷ For a summary of the legislation see: <http://www.aar.com.au/pubs/cc/focc19may09.htm>

2.9 National Guidelines & Initiatives

- (1) The main national (non-legislative) initiatives and bodies relevant to development of the coastal zone and climate change are briefly as follows:
 - (a) the COAG Working Group on Climate Change and Water, however it has not released any major reports or initiatives on climate change and coastal development;
 - (b) the Intergovernmental Coastal Advisory Group (**ICAG**), which is charged with the task of implementation of the *National Cooperative Approach to Integrated Coastal Zone Management: Framework and Implementation Plan*⁸. This document simply identifies the need for national coordination without any detailed proposals and the ICAG has not to date produced any further document or plan in relation to coastal zone development and climate change; and
 - (c) the Local Government and Planning Minister's Council and its Planning Officials Group. Again, however no specific reports have been released on climate change impacts in coastal areas and the implications for planning.
- (2) Most recently, the House of Representatives Standing Committee on Climate Change⁹ released its report: *Managing our coastal zone in a changing climate: the time to act is now*¹⁰. Some of the report's recommendations have been noted in section 2.5 and 2.6 above.
- (3) The inquiry reported on the following terms of reference:
 - (a) existing policies and programs related to coastal zone management, taking in the catchment-coast-ocean continuum;

⁸ See: <http://www.environment.gov.au/coasts/publications/framework/index.html>

⁹ In March 2008 the Minister for the Environment, Heritage and the Arts Peter Garrett MP and the Minister for Climate Change and Water Senator Penny Wong asked the Standing Committee to investigate and report on climate change and environmental impacts on Australia's coastal communities.

¹⁰ See: <http://www.aph.gov.au/house/committee/ccwea/coastalzone/report.htm>

- (b) the environmental impacts of coastal population growth and mechanisms to promote sustainable use of coastal resources;
 - (c) the impact of climate change on coastal areas and strategies to deal with climate change adaptation, particularly in response to projected sea level rise;
 - (d) mechanisms to promote sustainable coastal communities; and
 - (e) governance and institutional arrangements for the coastal zone.
- (4) The Committee found there is a role for the Australian Government to provide leadership in coordinating scientific information on climate change projections and impacts affecting the coastal zone.
- (5) The Committee also saw a role for the Australian Government to establish nationally consistent climate change benchmarks for coastal planning, particularly for sea level rise; co-ordinate national coastal vulnerability assessments to ensure consistency in coastal planning responses; develop appropriate information toolkits to assist in coastal climate change adaptation and integrated coastal zone management; and encourage community input into national coastal zone policy, planning and management¹¹.
- (6) The Committee also recommended a COAG intergovernmental agreement on the coastal zone. The Australian Government has not yet responded to the report¹².

¹¹ Chapter 6, pp 287-288.

¹² http://www.aph.gov.au/house/committee/report_register/bycomlist.asp?id=1028, at 23 November 2009.

2.10 **Department of Climate Change's Report: Climate Change Risks to Australia's Coast**

- (1) The Commonwealth Department of Climate Change released its report *Climate Change Risks to Australia's Coast* on 14 November 2009. The report actions aspects of the *National Climate Change Adaptation Framework* endorsed by COAG in 2007 that recognise national assessments are required to support informed decisions on adaptation action.
- (2) The report contains the findings of the first national assessment of the risks posed to the whole of Australia's coastline by climate change.
- (3) The report aimed to:
 - (a) Provide an initial assessment of the future implications of climate change for nationally significant aspects of Australia's coast, with a particular focus on coastal settlements and ecosystems.
 - (b) Identify areas at high risk to climate change impacts.
 - (c) Identify key barriers or impediments that hinder effective responses to minimise the impacts of climate change in the coastal zone.
 - (d) Help identify national priorities for adaptation to reduce climate change risk in the coastal zone.

As such, the focus of the report is on assessing and identifying climate change risks and possible responses, rather than making recommendations as to what the Australian Government should do.

- (4) The report suggests land use zoning based on climate change risks, taking into account matters such as the location and life span of assets. The report proposes different responses to climate change in different areas based on this vulnerability zoning.

- (5) According to the report, three different adaptation approaches called 'protect, accommodate and retreat' are the common approaches for management of the coastal zone built environment. 'Protection' refers to constructing 'hard' engineering defences such as seawalls and dykes, as well as 'soft' protective works such as nourishment of beaches. 'Accommodation' refers to modifying existing structures, for example building floor levels, and minor works, such as installing tidal flood gates on drains. 'Accommodation' also includes providing setbacks, buffers and emergency management plans. 'Planned or managed retreat' denotes the relocation of built assets from high risk areas to lower risk areas.
- (6) The report supports a regional approach to addressing climate change, referring to local regions within States and Territories. Such an approach would mean investigating and understanding the particular risks faced by a region, the value of assets and property threatened by those risks and hence deciding the appropriate adaptation approach for each region.
- (7) Following the report, Senator Wong announced the establishment of a seven-member Coasts and Climate Change Council to 'engage with the community and stakeholders and advise the Government in the lead up to a Coastal Climate Change Forum', which will be held in early 2010.¹³

2.11 Legal regulatory framework – International

- (1) **United Nations Framework Convention on Climate Change (UNFCCC)**
 - (a) The UNFCCC aims to stabilise greenhouse gas concentrations to prevent dangerous interference with climate. It provides a framework for sharing greenhouse gas observations, strategies and practices.
 - (b) The UNFCCC was ratified by about 190 countries and entered into force on 21 March 1994.

¹³ Senator the Hon. Penny Wong, Minister for Climate Change and Water, Media Release dated 14 November 2009.

(2) **Kyoto Protocol to the UNFCCC (Kyoto Protocol)**

- (a) Greenhouse gas targets, which are called assigned amounts (**AAUs**), are binding on parties that ratify the protocol. It entered into force on 16 February 2005. Australia signed the ratification instrument on 3 December 2007 and ratification came into effect on 11 March 2008.
- (b) Parties must implement domestic policies and measures to achieve this target, and provide annual greenhouse gas inventories. Failure to meet target results gives rise to a 30% penalty in the next target period, and prevents trading of that country's credits.
- (c) The protocol allows specific "carbon sinks" (eg land use change, reforestation, revegetation) to be counted as a credit ("removal units" or "**RMUs**"), subject to a cap. There are three main mechanisms for reducing emissions:
 - (i) Joint Implementation:
 - (A) A party may reduce emissions or introduce carbon sinks in another party to the Convention (developed country).
 - (B) Emission Reduction Units (**ERUs**) count against its own target, reducing the cost of meeting targets.
 - (ii) Clean Development Mechanisms:
 - (A) A party may undertake projects, supervised by an executive group, in developing countries.
 - (B) Emissions are certified by independent organisation: Certified Emission Reductions (**CERs**).

(iii) International Emissions Trading:

(A) A party may trade AAUs, RMUs, ERUs or CERs. Further rules governing these schemes were agreed to at the COP/MOP1 meeting.

(d) From 2008 to 2012 Australia will be involved in negotiations and programs to implement a post 2012 agreement.

(3) **Montreal Protocol on Substances that Deplete the Ozone Layer (1987) (Montreal Protocol)**

(a) This protocol covers synthetic greenhouse gases such as Hydrochlorofluorocarbons (**HCFCs**) and hydrofluorocarbons (**HFCs**). The protocol was developed in 1987, and entered into force on 1 January 1989.

(b) Australia has implemented this protocol.

(4) **Other environmental treaties**

2.12 **Legal regulatory framework — Commonwealth**

(1) **Australian Constitution**

(a) The Commonwealth has legislative power in respect of:

(i) s 51(1): “trade and commerce with other countries, and among the States”. Reliance on this power has decreased given the expansive interpretation of the corporations power.

(ii) s 51(2): “taxation; but so as not to discriminate between States or parts of States”. See also s 53 (tax law cannot originate from the Senate) and s 55 (tax law must only deal with tax).

(iii) s 51(20): “foreign corporations, and trading or financial corporations formed within the limits of the

Commonwealth". This has been interpreted broadly in recent times: see eg *NSW v Commonwealth* [2006] HCA 62 (WorkChoices constitutional challenge).

- (iv) s 51(29): "external affairs". The Commonwealth would have significant power to enact a national carbon trading scheme on the basis of Kyoto Protocol and its successors.

(2) Corporations Act 2001 (Cth)

- (a) s 299(1)(f): requirement to report on significant environmental regulation under a law.
- (b) s 299A: directors report must include "information reasonably required to make an informed assessment of a listed company's operations, financial position and prospective business strategies".
- (c) s 1013A-F: product disclosure for financial products.
- (d) See also corporate sustainability reporting: at 2.15, 2.16(6)(a).

(3) Energy Efficiency Opportunities Act 2006 (Cth)

- (a) Requires reporting, plus identification/improvement by users of 0.5 petajoules or more of energy per year (~\$1.5m gas, \$5m electricity, \$11m diesel).

(4) Environmental Protection and Biodiversity Conservation Act 1999 (Cth)

- (a) Implements various environmental and biological conservation treaties. Administered by Department of Environment, Water, Heritage and the Arts: see 2.16(6).
- (b) Recently, the Federal Government has rejected a call for the creation of a greenhouse trigger under this legislation.

Permits and Approvals

- (c) Under the assessment and approval provisions of the Act, actions that are likely to have a "significant impact"¹⁴ on a specified "matter of national environmental significance" are subject to assessment and approval by the Commonwealth Minister for the Environment, Heritage and the Arts. An action includes a project, development, undertaking, activity, or series of activities.
- (d) The EPBC Act currently identifies six matters of national environmental significance: World Heritage properties; Ramsar wetlands of international significance; listed threatened species and ecological communities; listed migratory species; Commonwealth marine areas; and nuclear actions (including uranium mining).
- (e) Approval is not needed to take an action if a bilateral agreement between the Commonwealth and the State or Territory declares that approval is not required, or a declaration is made by the Minister stating that the action does not need approval. An action also does not need approval if it is taken in accordance with a Regional Forest Agreement or a plan for managing the Great Barrier Reef.
- (f) A "greenhouse trigger"¹⁵ was first proposed in 2000 and a discussion paper was released. Later, the *Avoiding Dangerous Climate Change (Climate Change Trigger) Bill 2005*¹⁶ proposed a new s 25AA of the EPBC Act to provide a trigger based on emissions of 500,000t CO₂-e and an additional threshold of establishing a "significant impact" on the environment. The Bill also proposed a new s 141 of the EPBC Act whereby

¹⁴ There are Guidelines to assist with determination of what is a "significant" impact depending upon the particular matter of national environmental significance that is relevant. See:

<http://www.environment.gov.au/epbc/guidelines-policies.html#guidelines>

¹⁵ A DEH consultation paper on a possible greenhouse trigger was released in December 1999, a model trigger design was released in May 2000, and a draft regulation released on 16 November 2000. Under the draft regulation the trigger proposed was more than 0.5 Mt CO₂-e in any 12 month period. See also:- McGrath C 2006, 'Review of the EPBC Act', paper prepared for the 2006 Australian State of the Environment Committee, Department of the Environment and Heritage, Canberra, found at:-

<http://www.environment.gov.au/soe/2006/publications/emerging/epbc-act/index.html>

¹⁶ For a copy of the Bill see: <http://www.austlii.edu.au/au/legis/cth/bill/adccctb2005452/> . The Bill was introduced by Anthony Albanese as a private member's bill during the Howard Government.

greenhouse actions would be assessed against best practice environmental management and low emissions technology. The major criticism of the trigger proposed in the Bill is that establishing a “significant impact” from any individual project is virtually impossible.

- (g) This criticism has also been the reason that many court challenges to projects based on climate change impacts of projects have failed. Several large mining projects have been challenged in court recently on the basis that the Minister is required to consider "all adverse impacts" of a proposal and therefore that climate change is a relevant factor. While the challenges have raised the issue and effectively forced the government to include climate change as a relevant factor in its decision-making processes, most challenges have substantively failed to prevent projects from proceeding on this ground.¹⁷
- (h) As a result of these cases, proponents are increasingly being requested to identify and address greenhouse gas emissions and/or the potential impact of climate change on proposals as part of assessment under the EPBC Act. However no project has been refused a permit based on the extent of the greenhouse emissions of the project.

Resource Management

- (i) The EPBC Act also provides for the conservation of biodiversity by providing protection for listed species, communities and habitats in Commonwealth areas; cetaceans in Commonwealth waters and outside Australian waters; protected species in the

¹⁷ In the *Wildlife Preservation Society of Queensland Proserpine/Whitsunday Branch Inc v Minister for the Environment & Heritage & Ors* [2006] FCA 736 the government documents initially revealed that climate change had not been a relevant factor in the decision-making, however an Affidavit was later filed stating that climate change had been considered, but that, when judged against the scale of past, present and future global emissions, the emissions from the mines would not be measurable or identifiable, and, therefore, would not be likely to cause a significant impact on matters of national environmental significance (like the sensitive Great Barrier Reef or Wet Tropics) protected by the EPBC Act. The Court found that the decision-maker had complied with the Act and that the international climate change impacts from the project were effectively too remote from the impact on the protected matters. For more information see: www.edo.org.au/edonq/images/stories/documents/Media%20Release%20FINAL%20-%2015%20June%202006.pdf

Territories of Christmas Island, Cocos (Keeling) Islands and Coral Sea Islands protected areas (World Heritage properties; Ramsar wetlands; Biosphere reserves; Commonwealth reserves; and conservation zones); and wildlife species and wildlife products subject to international trade.

- (j) The Act allows for the creation of Commonwealth reserves, biosphere reserves and conservation zones over which management plans regulating activities in the area may be enforced.
- (k) The Act also grants the Minister the power to prepare recovery plans for listed threatened species; threat abatement plans in relation to "key threatening processes"; and bioregional plans in Commonwealth areas, including marine areas. Some environment groups have suggested the government utilise these provisions to take action on climate change by listing things such as land clearing as a threatening process due to its climate change impacts¹⁸.

(5) Fuel Tax Act 2006 (Cth)

- (a) Provides fuel tax credits in relation to fuel tax levied on taxable fuels. May have implications for bio-fuels blends (eg ethanol).

(6) National Environment Protection Council Act 1994 (Cth)

The field of operation of the National Environmental Council is constrained by the terms of its Act. The scope of the programs in which it can become involved are specified in the Act – and they do not include climate change.

(7) National Greenhouse and Energy Reporting Act 2007 (Cth)

- (a) An Act made to accommodate the proposed requirements for an emission trading scheme, unify reporting requirements in the

¹⁸ See: <http://www.edo.org.au/edoqld/edoqld/new/EPBC%20Handout%200508.pdf>

States and Territories, educate policy makers and the public, and to meet Australia's Kyoto reporting obligations.

(i) *National Greenhouse and Energy Reporting Amendment Act 2008*

- (A) Main goal of this Act is to allow the Greenhouse and Energy Data Officer to disclose additional information reported by corporations.

(ii) *National Greenhouse and Energy Reporting Amendment Act 2009*

This Act:

- (A) requires results of audits to be included on the National Greenhouse and Energy Register;
- (B) extends secrecy requirements to cover audit information;
- (C) allows the Administrative Appeals Tribunal to review certain decisions made by the Greenhouse and Energy Data Officer (**GEDO**);
- (D) gives the GEDO authority to audit certain reporting entities;
- (E) expands the scope of the legislative instrument relating to guidelines for external auditors;
- (F) requires auditors to apply to the GEDO for registration and provides the minister with power to determine registration requirements;
- (G) removes the requirement for the GEDO to publish corporate level certain energy production information; and

- (H) makes consequential amendments.
 - (iii) *National Greenhouse and Energy Reporting Regulations 2008*
 - (A) The regulations set up a framework for registration and reporting requirements for corporations.
 - (iv) *National Greenhouse and Energy Reporting (Measurement) Determination 2008*
 - (A) The Determination provides methods and criteria for calculating greenhouse gas emissions and energy data.
- (8) **Ozone Protection and Synthetic Greenhouse Gas Management Act 1989 (Cth)**
- (a) Regulates ozone depleting and other synthetic greenhouse gases, pursuant to Montreal Protocol/Vienna Convention: (see 2.11(2) above).
- (9) **Renewable Energy (Electricity) Act 2000 (Cth)**
- (a) Creates Mandatory Renewable Energy Targets (**MRET**) (see policy and implementation). Commonwealth aims for further 9,500 GWh renewable generation by 2010. The government is committed to increasing this to 20% by 2020.
 - (b) Creates a market for Renewable Energy Certificates (**RECs**). Generated by small generators, solar water heaters, manufacturers.
 - (c) Implemented by the Office of the Renewable Energy Regulator <http://www.orer.gov.au/>.

(10) Trade Practices Act 1974 (Cth)

- (a) s. 52 misleading and deceptive conduct re “green” products, carbon credits. See also Australian Competition & Consumer Commission publications (at 2.16(1) below).

2.13 Legal regulatory framework — States/Territories other than Victoria

(1) Climate Change (State Action) Act 2008 (Tas)

- (a) This Act aims at providing strategies for achieving State and internationally set targets for climate change.

(2) Electricity Supply Act 1995 (NSW) as amended by Electricity Supply Amendment (GGAS) Act 2009 (NSW)

- (a) The Greenhouse Gas Abatement Scheme (**GGAS**) imposes mandatory targets for reducing or offsetting the emission of greenhouse gases from the production of the electricity they supply or use. This is a cap-and-trade system.
- (b) NSW Greenhouse Abatement Certificates (**NGACs**) can be created and traded by supplying electricity from other states, demand side abatement, reductions from industrial process improvements or sequestration.
- (c) The Act commenced on 1 January 2003.

(3) Electricity (Greenhouse Gas Emissions) Act 2004 (ACT)

- (a) Creates the ACT Greenhouse Gas Abatement Scheme (**GGAS**). This scheme links closely with the NSW scheme.

(4) Electricity Amendment Act 2004 (Qld) (13% Gas Scheme)

- (a) From 1 January 2005, Queensland set a target that 13% of electricity must be from gas-fired generators. Gas-fired generators produce Gas Electricity Certificates (**GECs**), which can be traded. Penalties apply if the target is not reached.

2.14 Policies and related bodies — International

- (1) Intergovernmental Panel on Climate Change (IPCC)
 - (a) The IPCC was established jointly by the UN Environment Program (**UNEP**) and the World Meteorological Organization (**WMO**). Key reports:
 - (i) Third Assessment Report, 2001
 - (ii) Fourth Assessment Report, 2007 (various reports to be released between Q1 and Q4)

The IPCC is beginning the process for a Fifth Assessment Report to be completed by 2014.
- (2) European Union Emission Trading Scheme (EU ETS)
 - (a) Member States prepare National Allocation Plans (**NAPs**), which grant emission rights that can be bought and traded. Allowances are traded electronically. The aim is to allow member States to more cheaply comply with Kyoto requirements.
 - (b) The scheme was agreed to in October 2003, and commenced in January 2005. Some member States released too many pollution credits, causing carbon prices to drop. Provides practical feedback for future trading schemes.
- (3) Stern Review, commissioned by the UK Chancellor of the Exchequer
 - (a) Based on the economics of climate change, Nicholas Stern concludes that the benefits of early action (investing in mitigation) outweigh the costs of inaction.
- (4) US North-eastern states: Regional Greenhouse Gas Initiative
 - (a) Multi-state cap-and-trade program with a market-based emissions trading system. First trading period scheduled for 2009 to 2012 (3 year periods, which can be extended to 4 years). See news coverage at www.theage.com.au.

2.15 International Standards Bodies (Various)

- (a) Global Reporting Initiative, G3 Framework for sustainability reporting.
- (b) GHG Protocol by World Resources Institute and the World Business Council for Sustainable Development

See also 2.16(6)(a).

2.16 Policies and related bodies — Commonwealth

- (1) Australian Competition & Consumer Commission
 - (a) Green Marketing and the Trade Practices Act (8 February 2008)

Designed to help companies produce compliant green advertisements in response to the increase in TPA breaches.
 - (b) Carbon Claims and the Trade Practices Act (27 June 2008)

These guidelines are provided to aid businesses make legitimate carbon offset and neutrality claims
 - (c) Enforcement action in respect of misleading and deceptive conduct.
- (2) Australian Stock Exchange
 - (a) ASX Corporate Governance Principles 2nd edition.
- (3) Carbon Disclosure Project
 - (a) This not-for-profit organisation collects and reports on carbon disclosure by national and multinational companies. See 2009 report for Australia/New Zealand.
- (4) Commonwealth Parliament
 - (a) Joint Standing Committee on Treaties: CO2 sequestration in sub-seabed formations

On Monday 26 March 2007, the Joint Standing Committee on Treaties tabled its report on the *Review of treaties tabled on 20 June (2), 17 October, 28 November (2)2006 and CO2 Sequestration in Sub-Seabed Formations*.

- (b) Joint Committee on Corporations and Financial Services:
Corporate responsibility: Managing risk (June 2006)

- (5) Commonwealth Department of Climate Change
 - (a) Programs formerly run by the Australian Greenhouse Office and the Department of the Environment, Water, Heritage and the Arts.
 - (i) Agricultural R&D Investment Plan

3 rounds of funding completed (Nov 2004, Feb 2005, Feb 2006).
 - (ii) Greenhouse Challenge Plus

Business–government partnership to reduce emissions (eg generator efficiency standards).
 - (iii) Greenhouse Gas Abatement Programme (**GGAP**)

3 funding rounds for projects have finished (March 2006).
 - (iv) Low Emissions Technology Demonstration Fund (**LETDF**)

Further rounds of funding available (March 2007).
 - (v) Mandatory Renewable Energy Targets (**MRET**)

See 2.12 above.
 - (vi) National Greenhouse Accounts
 - (vii) National Carbon Accounting System

Tracks greenhouse gas sources and sinks geographically

- (viii) National Code for Wind Farm
 - (ix) Other energy efficiency programs targeted at consumers or industry (see also [Energy Ratings](#), [Energy Star](#), [Green Vehicle Guide](#), [Nationwide House Energy Rating Scheme](#), [TravelSmart](#))
- (6) Commonwealth Department of the Environment, Water, Heritage and the Arts
- Formerly the Department of Environment and Water Resources which was formerly the Department of Environment and Heritage.
- (a) Voluntary corporate sustainability reporting
 - (b) National Strategy for Ecologically Sustainable Development (December 1992)
 - (i) This policy was made to encourage building developments to meet the needs of the present whilst also using as little resources as possible in building and being as environmentally friendly to run as possible.
 - (c) National Australian Built Environment Rating System (NABERS)
 - (i) Formerly Australian Building Greenhouse Rating (ABGR). The NABERS scheme is administered nationally by the Department of Energy, Utilities and Sustainability (NSW).
 - (ii) Provides a voluntary system for rating the environmental sustainability of building developments.
 - (d) Solar Homes and Communities Plan
 - (i) Formerly called the Photovoltaic Rebate Program. Provides a rebate of up to \$8,0000 to households who install solar cells on their roofs. An income means test has now been applied to this program.

- (7) Commonwealth Department of Prime Minister & Cabinet
- (a) Securing Australia's Energy Future (2004)
 - (b) Task Group on Emissions Trading (established December 2006 task force. Published final report on 31 May 2007).
 - (i) See also states/territories taskforce (**NETT**): at 2.17(2). Now superceded by Garnaut Review.
 - (c) Uranium Mining, Processing and Nuclear Energy Review, led by Dr Ziggy Switkowski
 - (i) Established June 2006; final report Dec 2006. It concludes that a nuclear energy industry is feasible with initial government assistance, and is more likely to compete if a price is placed on carbon emissions.
- (8) Environment Protection and Heritage Council
- (a) National Pollutant Inventory (**NPI**).
 - (i) Only covers reporting of one of six identified greenhouse gases (Nitrous Oxide). The NPI program could be readily expanded for reporting of greenhouse gas emissions from industry sectors.
- (9) Garnaut Review (Professor Ross Garnaut)
- Commissioned by the Labor Government to recommend how emissions trading should be implemented in Australia. This has become an important input for the Department of Climate Change to formulate the government's emissions trading scheme.
- (a) [Draft report](#) (July 2008)
 - (b) [Interim report](#) (February 2008)
 - (c) [Emissions trading discussion paper](#) (March 2008)

- (10) National Framework for Energy Efficiency (Federal/State/Territories)
 - (a) Relates to buildings, commercial and industrial, appliances and equipment, government, trade and professional training and accreditation, consumer information and finance.
- (11) National Industrial Chemicals Notification and Assessment Scheme (NICNAS)
 - (a) Regulates various industrial chemicals. Does not appear to cover greenhouse gases.
- (12) Office of the Renewable Energy Regulator
 - (a) Mandatory Renewable Energy Targets (**MRET**)
 - (i) Oversees implementation of the MRET, and the creation and trading of Renewable Energy Certificates (RECs)

2.17 Policies and related bodies — states/territories other than Victoria

- (1) ACT Independent Competition and Regulatory Commission
 - (a) ACT Greenhouse Gas Abatement Scheme: see 2.13.
- (2) National Emissions Trading Taskforce (NETT) (State/territory governments)
 - (a) Established in 2004 to establish a National Emissions Trading Scheme (**NETS**).
 - (b) Separate from the Prime Minister's Task Group on Emissions Trading: see 2.16(7)(a).
 - (c) In February 2007, vows to introduce a trading scheme by 2010 if the Prime Minister does not commit to emissions trading by May 2007.
- (3) NSW Greenhouse Office
- (4) NSW Greenhouse Gas Abatement Scheme (GGAS)
 - (a) See 2.13(1).

- (5) Queensland ClimateSmart 2050
 - (a) Long term plan to address climate change
- (6) South Australia Tackling Climate Change: South Australia's Greenhouse Strategy 2007-2012
- (7) Tasmanian Climate Change Office
- (8) Department of Environment and Conservation (Western Australia)

3. **Victorian legislation, regulatory framework and policies**

3.1 **Legal regulatory framework - Victoria**

(1) **Coastal Management Act 1995**

The objectives of this Act are:

- (a) to plan for and manage the use of Victoria's coastal resources on a sustainable basis for recreation, conservation, tourism, commerce and similar uses in appropriate areas;
- (b) to protect and maintain areas of environmental significance on the coast including its ecological, geomorphological, geological, cultural and landscape features;
- (c) to facilitate the development of a range of facilities for improved recreation and tourism; to maintain and improve coastal water quality; and
- (d) to improve public awareness and understanding of the coast and to involve the public in coastal planning and management.

This Act relies on the Victorian Coastal Strategy, which is also relied upon by the Planning regime in Victoria for development along the Victorian coast (see policies and related bodies at 3.2 below.

(2) **Electricity Industry Act 2000 (Vic)**

- (a) Department of Primary Industries proposes to implement a premium feed-in tariff (in place of a standard feed-in tariff) to households which produce more energy (eg via photovoltaic cells) than they consume. See DPI website.

(3) **Electricity Industry (Wind Energy Development) Act 2004 (Vic), which amends the Electricity Industry Act 2000 (Vic)**

- (a) Facilitates the development of wind-generated power.

(4) Environmental Protection Act 1970 (Vic)

- (a) Environment Protection Authority (**EPA**) regulates various pollutants (eg vehicle emissions), waste and discharges.

(5) Environment Effects Act 1978 (Vic)

- (a) Environmental effects statements required prior to specified public works.

(6) Forestry Rights Act 1996 (Vic)

- (a) Regime for registering forestry agreements and carbon rights agreements which run with the land.

(7) Geothermal Energy Resources Act 2005 (Vic)

- (a) Regulates exploration permits, leases, extraction licences.

(8) Planning and Environment Act 1987 (Vic)

- (a) Regulates land use. Planning schemes and local government policies may require ecologically sustainable development principles to be implemented.

(9) Planning schemes (Victoria)

- (a) Each municipality in Victoria is covered by a planning scheme, which sets out policies and provisions for the use, development and protection of land. They are legal documents, prepared by the local council or the Minister for Planning and approved by the Minister.
- (b) The planning schemes include State content and local content. Different schemes may include different provisions in relation to climate change issues.

(c) Those planning schemes along the coast are:

- (i) Glenelg
- (ii) Moyne
- (iii) Warrnambool
- (iv) Corangamite
- (v) Colac Otway
- (vi) Surf Coast
- (vii) Greater Geelong
- (viii) Wyndham
- (ix) Hobsons Bay
- (x) Port Phillip
- (xi) Bayside
- (xii) Kingston
- (xiii) Frankston
- (xiv) Mornington Peninsula
- (xv) Casey
- (xvi) Cardinia
- (xvii) Bass Coast
- (xviii) French Island
- (xix) South Gippsland
- (xx) Wellington

- (xxi) East Gippsland
 - (xxii) Queenscliffe
- (d) There are several provisions in the Victorian Planning Provisions which deal with climate related issues. These are:
- (i) Clause 11.03-2 - Environment
 - (ii) Clause 11.03-3 – Energy use
 - (iii) Clause 15.08 – Coastal Areas – Links to Coastal Management Act 1995 and the Victorian Coastal Strategy.
 - (iv) Clause 15.12 – Energy efficiency
 - (v) Clause 56.06 – Access and mobility management
 - (vi) Clause 56.09 – Utilities

Local policy content differs from planning scheme to planning scheme. Interestingly Colac Otway Planning Scheme contains a specific policy on climate change at 21.04-7.

(10) Subdivision Act 1989

- (a) Act to deal with subdivision of land in Victoria including coastal land and farming land.

(11) Sustainability Victoria Act 2005 (Vic)

- (a) Victoria: see 3.2 below.

(12) Victorian Energy Efficiency Target Act 2007 (Vic)

- (a) Enters into force 1 January 2009. Encourages energy efficiency in the residential sector, which will be then expanded to cover energy retailers. To be administered by the Essential Services Commission.

(13) Victorian Renewable Energy Act 2006 (Vic)

- (a) Creates the Victorian Renewable Energy Target (**VRET**). Aims for ~10% (3,274 GWh) renewable energy by 2016. An accredited station produces Victorian Renewable Energy Certificates (**VRECs**), which can be transferred.
- (b) Scheme commenced 1 Jan 2007. Administered by Essential Services Commission: (see 3.2 below).

3.2 Policies and related bodies — Victoria

(1) Department of Primary Industries

- (a) Feed-in tariffs (see above at 3.1).

(2) Department of Premier and Cabinet

- (a) Office of Climate Change (established 2007)

(3) Department of Sustainability and Environment

- (a) Environmental Sustainability Framework 2005 (“Our Environment, Our Future”)
- (b) Sustainability Action Statement 2006
- (c) BushBroker
- (d) CarbonTender
 - (i) EOI stage 2 has closed (Oct 2006). Created an opportunity for landholders to plant carbon sinks, paid for by government.
- (e) Energy Efficiency Action Plan
- (f) Greenhouse Strategy Action Plan Update 2005
- (g) Greenhouse Gas Inventory
- (h) Renewable Energy Action Plan

(4) Essential Services Commission

(a) Victorian Renewable Energy Target (see above at 3.1).

(b) Victorian Energy Efficiency Target (see above at 3.1).

(5) **Sustainability Victoria**

Provides consumer information and advice on energy efficiency, including renewable energy. Researches and encourages sustainable practices:

(a) Research on energy use, renewable energy sources.

(b) Wind Energy Policy and Planning Guidelines.

(6) **Victorian Coastal Council**

(a) Victorian Coastal Strategy (2008).

(7) **Victorian Competition & Efficiency Commission**

(a) Issues Paper: Inquiry into Victorian Environmental Regulation, August 2008.

3.3 **Local Government**

Local government is defined under Section 74A of the *Constitution Act 1975* (Vic) as:

...a distinct and essential tier of government consisting of democratically elected Councils having the functions and powers that the Parliament considers are necessary to ensure the peace, order and good government of each municipal district¹⁹.

3.4 **Jurisdiction**

(1) Each Council is responsible for the governance of the area designated by its municipal boundaries²⁰. The *Local Government Act 1989* (Vic) defines

¹⁹ *Constitution Act 1975* (Vic) s74A(1)

²⁰ *Ibid* s74(1A)

a municipal district as the district under the local government of a Council²¹

- (2) Section (3A) of the *Local Government Act* states that:

If the boundary of a municipal district is described by reference to the sea coast (regardless of whether it is referred to as the sea shore or the waters of the sea or a bay or in any other way), that boundary is to be taken to be the line **for the time being** of the **low water mark** on that sea coast (emphasis added).²²

- (3) Commentary – Implications of Climate Change

As climate change will affect the position low level mark, it will have a significant impact on the municipal boundaries of the State.

3.5 Decision Making Powers

- (1) Section 3A of the *Local Government Act* lists the functions of a Council, which include:

- (a) providing and maintaining community infrastructure in the municipal district;
- (b) undertaking strategic and land use planning for the municipal district; and
- (c) exercising, performing and discharging the duties, functions and powers of Councils under this Act and other Acts²³.

- (2) Importantly, section 3E(2) of the Act states:

(2) For the purpose of achieving its objectives, a Council may perform its functions inside and **outside** its municipal district (emphasis added).

²¹ *Local Government Act* 1989 (Vic) s3 (1)

²² *Ibid* s3(3A)

²³ *Ibid* 3E(1)

- (3) For the purpose of the *Planning and Environment Act 1987*, Councils are:
- (a) the planning authority for any planning scheme in force in its municipal district²⁴; and
 - (b) the responsible authority for the administration or enforcement of a planning scheme (unless specifically exempted in the planning scheme by the Minister for Planning)²⁵.

The area covered by the scheme is usually the municipal district²⁶, however there is provision for an alternative area to be specified in the schedule to Clause 61.02. An example is the Colac Otway Shire where the planning scheme applies to the area of the “Colac Otway Shire municipal district and the area of the Apollo Bay harbour between the land and the breakwaters²⁷”.

- (4) Under the provisions of the *Crown Land (Reserves) Act 1978 (Vic)*, municipal Councils may be appointed as the Committee of Management for Crown land which has been reserved as a public park, garden or for recreation purposes²⁸. It is important to note that others, including individuals, may also be appointed as the Committee of Management. This can create the situation where a small section of coastline is managed by a number of different authorities, as demonstrated on the map of the coastline near San Remo (Map 1).

²⁴ Planning and Environment Act 1987 s8A(1)

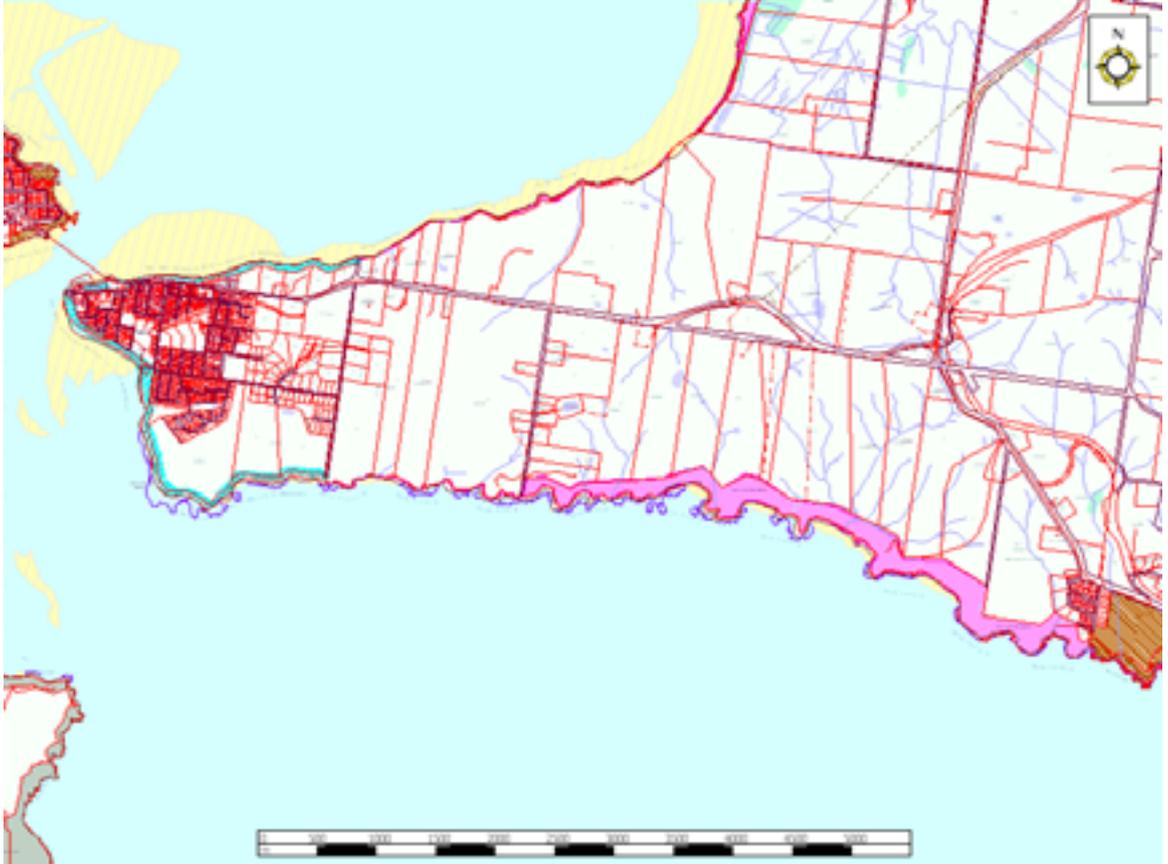
²⁵ Ibid s13

²⁶ Victorian Planning Provisions Clause 61.02

²⁷ Colac Otway planning Scheme Schedule to Clause 61.02

²⁸ Crown Land Reserves Act 1978 s14

Map 1



The foreshore area shown in blue is managed by a volunteer committee of management which consists of local community representatives, the pink area is managed by Parks Victoria, the grey area is managed by the Phillip Island Nature Park and the brown area is managed by Bass Coast Shire Council.

(5) 'Coastal Crown Land' is defined by the *Crown Land (Reserves) Act* as:

...land which is reserved either temporarily or permanently under this Act and which is coastal Crown land within the meaning of the Coastal Management Act 1995; declaration period means the period specified in a special event management declaration as the period for which the declaration is to apply²⁹;

²⁹ Ibid s3

(6) The *Coastal Management Act 1995* defines 'Coastal Crown Land' as:

- (1) *any land reserved under the Crown Land (Reserves) Act 1978 for the protection of the coastline; and*
- (2) *any Crown land within 200 metres of high water mark of-*
 - (a) *the coastal waters of Victoria; or*
 - (b) *any sea within the limits of Victoria; and*
- (3) *the sea-bed of the coastal waters of Victoria; and*
- (4) *the sea-bed of any sea within the limits of Victoria; and*
- (5) *any Crown land which is declared by the Governor in Council under subsection (2) to be coastal Crown land*

*but does not include any land which the Governor in Council declares under subsection (2) not to be coastal Crown land for the purposes of this Act;*³⁰

(6) Section 6 of the *Crown Land (Reserves) Act* states:

- 6 *The Governor in Council may by Order published in the Government Gazette declare **any land** or any part thereof reserved either temporarily or permanently for any purpose under any Act to be **permanently reserved for the protection of the coastline** and thereupon such land shall be deemed to be so reserved under subsection (1) for that purpose (emphasis added)*³¹

(7) Section 16 of the *Crown Land (Reserves) Act* facilitates the vesting of Crown Land in a municipal Council. An important exemption to this provision is section 16(5) which states:

- 5) *Land reserved for the purpose of the protection of the coastline **shall not be vested in a municipal council** under this section (emphasis added)*³²

³⁰ Coastal Management Act 1995 s3

³¹ Crown Land Reserves Act 1978 s6

³² Ibid s16(5)

3.5 **Commentary – Implications of Climate Change**

- (1) The ability of a Council to act outside its municipal district may become crucial as coastal boundaries change. For example, this may enable a Council to undertake protection works outside its municipal boundary (the low water mark).
- (2) The ability to amend the schedule to Clause 61.02 may give greater powers to Councils to manage the impacts of climate change. It needs to be acknowledged that Councils may not have the resources to accommodate the additional responsibilities.
- (3) The creation of numerous different Committees of Management for foreshore reserves can create difficulties in the day to day management of the foreshore. This is particularly critical when works are required to the foreshore, or where enforcement of illegal works, such as the dumping of tyres to prevent erosion, occurs.
- (4) Given that it is likely that more protection works will be required in the future, a clear position should be taken as to who should undertake these works, and be the enforcement agency in light of any illegal activity.

4. Victorian policy

4.1 Victorian Coastal Strategy (2008)

(1) The Victorian Coastal Strategy (**VCS**) is incorporated into each planning scheme in Victoria by virtue of its inclusion as an incorporated document in the Victorian Planning Provisions (**VPPs**). The VCS's purposes are:

(a) To provide:

- A vision for the planning, management and use of coastal, estuarine and marine environments;
- The government's policy commitment for coastal, estuarine and marine environments;
- A framework for the development and implementation of other specific strategies and plans such as Coastal Action Plans, management plans and planning schemes; and
- A guide for exercising discretion by decision-makers, where appropriate³³.

(2) Application:

(a) The VCS applies to all Victorian coastal waters (i.e. the sea and seabed to the State limit - three nautical miles or 5.5 kilometres off shore), and all private and coastal Crown land directly influenced by the sea or directly influencing the coastline³⁴.

(3) Relevance to Coastal Climate Change Planning Issues:

(a) The VCS contains a hierarchy of principles that provides the basis for all of the Strategy's policies and actions to guide planning, management and decision-making, including those

³³ VCS (2008) p5

³⁴ VCS (2008) p5

relevant to coastal climate change planning issues. The hierarchy of principles are:

- (i) Provide for the protection of significant environmental and cultural values.
 - (ii) Undertake integrated planning and provide clear direction for the future.
 - (iii) Ensure the sustainable use of natural coastal resources.
 - (iv) When the above principles have been considered and addressed:
 - Ensure development on the coast is located within existing modified and resilient environments where the demand for development is evident and the impact can be managed³⁵.
- (b) The Strategy's hierarchy of principles are derived from Section 15 of the *Coastal Management Act 1995* and are included in the State Planning Policy Framework (**SPPF**) in all planning schemes in Victoria.
- (c) Under Principle 2 of the hierarchy the VCS sets out the State Government's policy in relation to planning for climate change³⁶. Given the application of the Strategy noted above, this policy applies to Victorian coastal waters and all private and coastal Crown land directly influenced by the sea or directly influencing the coastline as follows;
- (i) Plan for sea level rise of not less than 0.8 metres by 2100, and allow for the combined effects of tides, storm surges, coastal processes and local conditions, such as topography and geology when assessing risks and impacts associated with climate change. As scientific

³⁵ VCS (2008) p3

³⁶ VCS (2008) p36

data becomes available the policy of planning for sea level rise of not less than 0.8 metres by 2100 will be reviewed.

- (ii) Apply the precautionary principle to planning and management decision-making when considering the risks associated with climate change.
- (iii) Prioritise the planning and management responses and adaptation strategies to vulnerable areas, such as protect, redesign, rebuild, elevate, relocate and retreat.
- (iv) Ensure that new development is located and designed so that it can be appropriately protected from climate change's risks and impacts and coastal hazards such as:
 - (A) inundation by storm tides or combined storm tides and stormwater (both river and coastal inundation)
 - (B) geotechnical risk (landslide)
 - (C) coastal erosion
 - (D) sand drift.
- (v) Avoid development within primary sand dunes and in low-lying coastal areas.
- (vi) Encourage the revegetation of land abutting coastal Crown land using local provenance indigenous species to build the resilience of the coastal environment and to maintain biodiversity.
- (vii) New development that may be at risk from future sea level rise and storm surge events will not be protected by the expenditure of public funds.

- (viii) Ensure that climate change should not be a barrier to investment in minor coastal public infrastructure provided the design-life is within the timeframe of potential impact.
- (ix) Ensure planning and management frameworks are prepared for changes in local conditions as a result of climate change and can respond quickly to the best available current and emerging science.
- (x) Ensure all plans prepared under the *Coastal Management Act 1995* and strategies relating to the coast, including Coastal Action Plans and management plans consider the most recent scientific information on the impacts of climate change³⁷.

(4) VPELA Reference Group Commentary:

The VCS applies to “*all private and coastal Crown land directly influenced by the sea*”. ‘Influenced’ is an imprecise term. It is necessary to consider whether, strictly speaking, this means that land that is projected to be impacted by the coastal impacts of climate change, but is not currently influenced by these impacts, is not subject to VCS policy.

Further, the VCS is directed to decisions concerning future development. There are many areas of the coast that are already developed that are at risk from the effects of climate change – most notably sea level rise. The VCS does not specifically address the situation where a person owns land which is at risk but which has long been zoned and developed for residential purposes. If that person wishes to replace the existing dwelling it would attract the operation of the VCS. As is currently stands the VCS has the capacity to render such development “inappropriate”. It is perhaps not an intended consequence. A more considered approach would be desirable.

³⁷ VCS (2008) p38

4.2 Ministerial Direction No. 13

(1) Purposes:

- (a) To set out the general requirements for consideration of the impacts of climate change within coastal Victoria as part of a planning scheme amendment which would have the effect of allowing non-urban land to be used for an urban use and development³⁸.

(2) Application:

- (a) To any planning scheme amendment that provides for the rezoning of non-urban land for urban use and development of all land:
- (i) Abutting the coastline or a coastal reserve;
- (ii) Less than 5 metres Australian Height Datum within one kilometre of the coastline including the Gippsland Lakes³⁹.

(3) Relevance to Coastal Climate Change Planning Issues:

- (a) For any proposed planning scheme amendment that meets the above criteria, the planning authority must include in the Explanatory Report a description of how the Amendment:
- (i) is consistent with the policies, objectives and strategies for coastal Victoria as outlined in Clause 15.08 of the SPPF.
- (ii) addresses the current and future risks and impacts associated with projected sea level rise and the individual and/or combined effects of storm surges, tides, river flooding and coastal erosion.

³⁸ Ministerial Direction No. 13
³⁹ Ministerial Direction No. 13

- (iii) is based on an evaluation of the potential risks and presents an outcome that seeks to avoid or minimise exposing future development to projected coastal hazards Ensures that new development will be located, designed and protected from potential coastal hazards to the extent practicable and how future management arrangements will ensure ongoing risk minimisation.
- (iv) considers the views of the relevant floodplain manager and the Department of Sustainability and Environment⁴⁰.

(4) VPELA Reference Group Commentary:

Ministerial Direction No 13 applies comprehensive requirements for the consideration and assessment of coastal hazards as part of the planning scheme amendment process. Again, the situation of a land owner who is already at risk of climate change is not addressed. The critical issue here is for a decision to be made about what the State will do.

There are three options. The first is forced retreat – ie to acquire the land at risk in a similar fashion or according to a similar program to that which has been carried out on French Island. The virtue of this option is that it is certain and fair.

The second option would be to allow landowners to remain in occupation, paying rates and so on, but apply policy and planning controls to effectively stifle any form of redevelopment – effectively rendering the land unusable – such as has occurred in Wellington Shire on the Coast between Seaspray and Golden Beach.

The third option is to allow development in already established and zoned areas of risk (provided that there are no other environmental consequences).

This is a difficult choice. At the moment the policy framework is unclear.

⁴⁰ Ministerial Direction No. 13

4.3 State Planning Policy Framework

(1) Purposes:

Broadly, the purpose of the SPPF is to inform planning authorities and responsible authorities of those aspects of State planning policy that are to be taken into account and given effect to in planning decisions and in the administration of their respective planning schemes⁴¹.

(2) Application:

Every planning scheme in Victoria contains the SPPF, which is identical in all schemes⁴².

(3) Relevance to Coastal Climate Change Planning Issues:

(a) The SPPF specifies that decision-making by planning authorities and responsible authorities should apply the hierarchy of principles for coastal planning and management as set out in the VCS.

(b) With specific regard to managing coastal hazards and the coastal impacts of climate change, the SPPF specifies that planning to manage coastal hazards and the coastal impacts of climate change should:

(i) Plan for sea level rise of not less than 0.8 metres by 2100, and allow for the combined effects of tides, storm surges, coastal processes and local conditions such as topography and geology when assessing risks and coastal impacts associated with climate change.

⁴¹ Clause 11.01 VPP

⁴² Section 3. Planning Scheme User Guide

- (ii) Apply the precautionary principle to planning and management decision-making when considering the risks associated with climate change.
- (iii) Ensure that new development is located and designed to take account of the impacts of climate change on coastal hazards such as the combined effects of storm tides, river flooding, coastal erosion and sand drift.
- (iv) Ensure that land subject to coastal hazards are identified and appropriately managed to ensure that future development is not at risk.
- (v) Avoid development in identified coastal hazard areas susceptible to inundation (both river and coastal), erosion, landslip/landslide, acid sulfate soils, wildfire and geotechnical risk⁴³.

(4) VPELA Reference Group Commentary:

The SPPF applies comprehensive requirements for the consideration and assessment of coastal hazards. Like the whole of the planning scheme, the SPPF provides a list of matters that are to be taken into account in weighing up whether or not approval should be given. The SPPF does not give clear guidance about the relative importance of each factor nor are the objectives clearly prioritised.

As experience has demonstrated time and again, a sophisticated list of relevant matters to be taken into account and balanced carefully in favour of reaching an appropriate outcome in the circumstances can be transformed into an unsophisticated “checklist” by planners and professionals who are unskilled in the specific sciences involved or under resourced. This approach is both a perversion of the intent of the New Format planning schemes and a sure way of achieving anomalous or unfair outcomes in individual cases. It is a trait evident in all aspects of

43 Clause 15.08-2

planning across the State and is a factor that must be considered in the context of reviewing the legislative regime applicable to climate change.

4.4 Local Planning Policy Frameworks

(1) Purposes:

- (a) Local Planning Policy Frameworks (**LPPF**) consist of Municipal Strategic Statements (**MSS**) and Local Planning Policies.
- (b) An MSS is meant to be a concise statement of the key strategic planning, land use and development objectives for the municipality and the strategies and actions for achieving the objectives. It provides the strategic basis for the application of the zones, overlays and particular provisions in the planning scheme and decision making by the responsible authority.
- (c) Local Planning Policies are intended as tools to implement the objectives and strategies of the MSS.

(2) Application:

- (a) Every Planning Scheme in Victoria contains an LPPF

(3) Relevance to Coastal Climate Change Planning Issues:

- (a) LPPF's are intended to be dynamic planning tools and are regularly revised and updated in response to various social, environmental and economic influences (at local, regional, State or National level). Therefore, as coastal climate change planning issues continue to emerge, the LPPF's of Victoria's coastal Council's will be a key planning tool to guide appropriate decision making.
- (b) A summary of all existing objectives and strategies relevant to coastal climate change planning issues contained in LPPF's of Victorian coastal municipalities is contained at Appendix 1 to this report.

- (4) VPELA Reference Group Commentary:
- (a) All LPPF's of Victoria's coastal Councils contain objectives and strategies that are relevant to sea level rise, coastal erosion and inundation. Of the 21 LPPF's of Victoria's coastal Councils, 9 contain objectives and strategies that have been written with the specific intent of ensuring decision making takes into consideration the coastal impacts of climate change⁴⁴. The remaining LPPF's contain objectives and strategies that are only *incidental*, rather than *specific*, to the core issues of coastal climate change. In other words, objectives or strategies that appear in the LPPF could be interpreted as a trigger for the consideration of the effects of coastal climate change but have not been written with that express purpose in mind – leaving the applicability of coastal climate change issues to a question of statutory construction. This is highly undesirable. While it is true that section 60 of the *Planning and Environment Act* charges a responsible authority with the power to take into account any other relevant matter, and while there can be little doubt that the effects of coastal climate change would be a relevant matter in a coastal location, there is scope for an argument that the express mention of coastal climate change effects in other planning schemes or in other parts of the same planning scheme signifies that where the issue is not mentioned it should not be considered relevant. Clarity of expression is critical.
- (b) Virtually all LPPF's of Victoria's coastal Councils contain objectives and/or strategies that seek to protect and enhance existing coastal landscapes, environments and settlements along the Victorian coast⁴⁵. In many instances the combination of

⁴⁴ Glenelg, Moyne, Warrnambool, Colac Otway, Greater Geelong, Frankston, Mornington Peninsula, Bass Coast, East Gippsland

⁴⁵ i.e. “*protect the nationally significant Great Ocean Road Region landscape and the distinctive landscape qualities and coastal setting of Kennett River township*” (Clause 21.03-6 Colac Otway PS). “*The distinctive and unique cultural heritage, built form character and environmental setting of the St Kilda Foreshore Area is retained and enhanced, to reinforce the locality's threefold seaside residential, leisure and entertainment, and marine recreation Role*” (Clause 21.04-6 Port Phillip PS).

controls and policies has the effect of rendering land already zoned for urban use undevelopable. The coastal impacts of climate change will have an impact upon the attributes that generic policy statements seek to protect. There are two issues that emerge. First, what is the planning benefit of seeking to protect the existing character of an area when it is accepted that it is likely that owing to a fundamental environmental change the character of the area will invariably change? Second and perhaps more important is that the planning system seems capable of regulating land use in the context of the character debate, but it should not be used as a de facto attempt to render a landowner's land undevelopable without some form of compensation for planning blight. Planning blight and compensation for it are matters discussed at length in both the Gobbo Report, 1978 and the Morris Report (Land Acquisition and Compensation: Proposals for new land acquisition and compensation legislation: report to the Minister for Planning, 1983).

- (c) The absence of specific guidance has resulted in some Councils seeking to introduce their own measures to address the potential problem. A uniform approach lead by the State is a superior outcome.

4.5 Practice Notes and other action plans

- (1) In addition to the legislation and VPPs, a number of other practice notes and guidelines under related legislation exist as follows.
- (2) **General Practice Note – Managing coastal hazards and the coastal impacts of climate change.**
 - (a) Purposes:

Provides guidance on:
 - (i) managing coastal hazards in the context of climate change

- (ii) coastal vulnerability assessments
- (iii) the decision making process for assessing coastal hazard risk
- (iv) planning for development in vulnerable coastal areas⁴⁶.

(b) Application:

Generally applicable / relevant to all land use planning decisions in coastal areas.

(c) Relevance to Coastal Climate Change Planning Issues:

- (i) Provides guidance for the appropriate consideration and assessment of the impacts of climate change for both rezoning Amendments and planning permit applications.
- (ii) Assists both applicants and responsible authorities in understanding how the management of risks associated with coastal hazards should be considered and incorporated into the decision making process.

(d) VPELA Reference Group Commentary:

Provides a simple, plain English summary of the basic coastal climate change planning issues.

(3) **Coastal Planning Fact Sheet – Managing coastal hazards and the impact of climate change**

(a) Purposes:

Provides general information on current State Government directions regarding the coastal impacts of climate change⁴⁷.

⁴⁶ General Practice Note: Managing coastal hazards and the coastal impacts of climate change. DPCD 2008
⁴⁷ Coastal Planning Fact Sheet: Managing Coastal Hazards And The Coastal Impacts Of Climate Change. DPCD 2008

(b) Application:

Generally applicable / relevant to all land use planning decisions in coastal areas.

(c) Relevance to Coastal Climate Change Planning Issues:

Provides a summary of current State Government directions regarding:

- (i) Development along the coast;
- (ii) How the VCS will be given effect to in planning schemes;
- (iii) How sea level rise should be considered as part of planning schemes;
- (iv) How sea level rise should be considered through planning scheme amendments;
- (v) How sea level rise should be considered through planning permits.

(d) VPELA Reference Group Commentary:

Provides a simple, plain English summary of the basic coastal climate change planning issues and current State Government directions.

(4) **DSE Advisory Note- How to consider a sea level rise along the Victorian coast**

(a) Purposes:

To provide guidance for decision makers in using the sea level rise predictions in the VCS⁴⁸.

⁴⁸ Advisory Note: How to consider a sea level rise along the Victorian Coast. DSE 2008

(b) Application:

Specifies that sea level rise should be taken into consideration in long term planning as part of national, State and local responses to adapting to climate change.

(c) Relevance to Coastal Climate Change Planning Issues:

(i) Discusses why sea level rise should be considered in long term planning and how the benchmark contained in the VCS should be used.

(ii) Also indicates that the State Government will develop the following products to support decision makers when it is considering climate change impacts for future planning:

(A) A guideline for coastal erosion and inundation assessments and set backs

(B) Mapping of areas physically vulnerable to climate change impacts along the coasts (delivered as part of the Future Coasts Program)

(C) Decision making support tools (delivered as part of the Future Coasts Program)

(d) VPELA Reference Group Commentary:

Provides a simple, plain English summary of the basic coastal climate change planning issues and current State Government directions, as well as links to other relevant information sources (the websites of CSIRO, DPCD & Future Coasts).

Of course, the guideline, the practice note and the advisory note do not have any statutory planning significance. These documents are merely an attempt to explain the complicated mess of information and relevant documents that exist in the field of climate change. Again, this is another manifestation of a trend

evident in planning in this State – planning by practice note or advisory note rather than by reference to primary planning documents.

(5) **Coastal Action Plans – Coastal Management Act 1995**

(a) Purposes:

The *Coastal Management Act 1995* enables the preparation of Coastal Action Plans by Regional Coastal Boards for their region or any part of their region⁴⁹.

(b) Coastal Action Plans:

- (i) Enable the broader principles and priorities of the VCS to be further developed and applied at a regional or sub-regional level, or for particular issues;
- (ii) Must be consistent with the VCS and play a key role in its implementation;
- (iii) Take a long term strategic view, clarify directions for future use and identify key actions required to achieve preferred outcomes;
- (iv) Are developed by or under the guidance of Regional Coastal Boards;
- (v) Involve public consultation during preparation; and
- (vi) Are referred to the Victorian Coastal Council for approval by the Council prior to referral by the Council to the Minister for Environment for endorsement⁵⁰.

⁴⁹ Division 2 Part 22 *Coastal Management Act 1995*.

⁵⁰ Guidelines for Preparing, Implementing and Reviewing Coastal Action Plans (page 3 October 2005)

(c) Application:

A number of Coastal Action Plans have been developed for a variety of Victoria's coastal regions⁵¹:

Western Coastal Board	Central Coastal Board	Gippsland Coastal Board
Central West Victoria Regional Coastal Action Plan	Boating Coastal Action Plan 2007	Gippsland Estuaries Coastal Action Plan
Central West Victoria Estuaries Coastal Action Plan	Mount Eliza to Point Nepean Coastal Action Plan 2005	Gippsland Lakes Coastal Action Plan
South West Estuaries Coastal Action Plan	Corio Bay Coastal Action Plan 2005	Gippsland Boating Coastal Action Plan
South West Victoria Regional Coastal Action Plan	Waterfront Geelong Coastal Action Plan (closed 2004)	Integrated Coastal Planning for Gippsland - Coastal Action Plan
Anglesea Coastal Action Plan		
Glenelg Coastal Action Plan		
Lorne Coastal Action Plan		
Moyne Coastal Action Plan		
Skenes Creek - Marengo Coastal Action Plan		
Warrnambool Coastal Action Plan		

51 Source: Western Coastal Board, Central Coastal Board and Gippsland Coastal Board Websites

- (d) Relevance to Coastal Climate Change Planning Issues:
 - (i) Coastal Action Plans provide a key mechanism for the implementation of the VCS. Coastal Action Plans enable the broad principles and priorities identified in the Strategy to be further developed and applied at a sub-regional or issue-based level. A Coastal Action Plan can provide strategic direction for the future management of an area of coast likely to be affected by the coastal impacts of climate change by identifying necessary priorities, actions and outcomes.
 - (ii) Some existing Coastal Action Plans have already developed and applied the coastal climate change directions of the VCS (note: some using the directions of the 2001 Strategy) at a sub-regional level⁵².

- (e) VPELA Reference Group Commentary:

A Regional Coastal Board must review a Coastal Action Plan applying in its region at any time at the direction of the Minister. This provides an opportunity for review and update to all Coastal Action Plans to implement the specific directions of the VCS and, if appropriate, any regionally specific findings of the Future Coasts Program.

- (6) Other

- (a) The Borough of Queenscliffe Council is currently seeking community feedback on an "Interim Local Floodplain Development Plan", which is designed to guide Council's decision making on planning applications in areas that are identified as prone to flood risk due to sea level rise. The Interim Local Floodplain Development Plan identifies areas of low, medium, high and extreme risk in the Borough and recommends

⁵² i.e. Corio Bay Coastal Action Plan 2005, Integrated Coastal Planning for Gippsland - Coastal Action Plan 2002, Gippsland Lakes Coastal Action Plan 1999, Gippsland Estuaries Coastal Action Plan 2006.

interim conditions that should be applied to planning applications⁵³.

- (b) The Gippsland Coastal Board has commissioned research to inform Gippsland coastal planners, managers and community stakeholders on climate change, sea level rise and coastal subsidence (“Climate Change, Sea Level Rise and Coastal Subsidence along the Gippsland Coast”. Gippsland Coastal Board July 2008⁵⁴). The research includes flood inundation modelling for Anderson Inlet, Lakes Entrance and Loch Sport available through the Board’s website.

(7) Overview – VPELA Reference Group

The above represents a survey of all areas of the Victorian planning and environment framework relevant to coastal issues. The survey reveals that there is considerable discussion about climate change issues in the upper echelons of policy and broad acknowledgement of the issues. The survey also reveals that responsibility for developing a response to coastal climate change is spread across a number of agencies and processes with no clear link.

The only clear link between all of these agencies is the VCS which is adopted or made applicable in all areas related to the coast. The problem here is that the VCS is itself a high order policy tool which contains inherent ambiguity and inconsistency.

The bodies charged with giving effect to the VCS are often not required to engage in one another’s statutory processes. When a coastal board develops a coastal action plan under the *Coastal Management Act* there is no public consultation or panel hearing (such as might be the case in the context of a planning scheme amendment).

In the absence of specific guidance at the level of the system where the principles are being applied, there is scope for different agencies to

53 Source: Borough of Queenscliffe Website

54 Source: Gippsland Coastal Board Website

formulate divergent views about the best approach to climate change impacts. A number of factors influence the various approaches to the application of broad policy. There can be little doubt that the politics of climate change have a bearing and influence on the outcomes from one location to the next depending upon the composition of committees of management, boards and local community attitudes. This creates the potential for discrimination.

There is merit in resolving upon a universal code or position in relation to climate change impacts in coastal areas, or at the very least ensuring that all the bodies with responsibility for developing responses to the possible impacts of climate change are subject to review and authorisation by a body which is capable of ensuring that decisions are not taken in isolation and that all parts of the land use management framework operate in an integrated way.

There is merit in considering legislative change to bring the consideration of these matters under the auspices of one legislative framework where questions of interpretation and co-ordination of processes can be achieved most efficiently.

5. Victorian cases - VCAT

Summary of Victorian cases Tribunal decisions relevant to coastal climate change planning issues

5.1 Victorian case law - *Gippsland Coastal Board v South Gippsland Shire Council*

- (1) The principal Victorian case relevant to coastal climate change planning issues is *Gippsland Coastal Board v South Gippsland Shire Council*⁵⁵.
- (2) In this case, the Victorian Civil and Administrative Tribunal (**VCAT**) upheld an application to review the South Gippsland Shire Council's decision to grant permits for the development of dwellings in a coastal area within the Farming Zone.
- (3) The case was heard at a time when there was no specific reference to climate change or sea level rise in the South Gippsland Planning Scheme (including the VCS).
- (4) The Tribunal nevertheless held that sea level rise and the risk of coastal inundation were relevant matters to consider in appropriate circumstances. There was no specific evidence before the Tribunal regarding the impact of climate change on the proposed development. However, the Tribunal considered that CSIRO reports tabled at the hearing were sufficient to demonstrate that there was a risk of rising sea levels affecting the subject site.
- (5) The Tribunal relied on section 60(1)(e) of the *Planning and Environment Act 1987* (Vic), which provides that before deciding on a permit application, the responsible authority must consider any significant effects which the responsible authority considers:
 - (a) the use or development may have on the environment; or
 - (b) the environment may have on the use or development.

55 [2008] VCAT 1545

- (6) It held that the section was sufficiently broad to make sea level rise and coastal hazards a relevant consideration in this case.
- (7) The Tribunal also relied on the precautionary principle. It noted that the principle is included in the Inter-Governmental Agreement on the Environment, which forms part of the framework for decision making concerning the environment pursuant to clause 11.03-2 of the SPPF.
- (8) The Tribunal concluded that increases in the severity of storm events coupled with rising sea levels created a reasonably foreseeable risk of inundation of the subject land and the proposed dwellings, which was unacceptable. Accordingly, the application for review was upheld and no permit was granted.
- (9) Following the Gippsland Coastal Board case, the policy framework for coastal climate change issues in Victoria changed significantly.
- (10) The VCS was released. Amendment C52 was approved which, among other things, amended clause 15.08 (Coastal Areas) of the SPPF. In addition, the Managing Coastal Hazards and the Coastal Impacts of Climate Change General Practice Note and Ministerial Direction were released.
- (11) These documents now constitute the strategic policy context around which VCAT (and responsible authorities) must make its decisions.
- (12) The Deputy President in charge of the Planning and Environment List of VCAT has stated:

One significant aspect of this [the policy] response is acceptance of the proposition that climate change will have an impact on coastal areas and consequently there is a need to manage these impacts and coastal hazards. The onus is placed squarely upon proponents of developments or planning scheme amendments to establish by way of an 'informed coastal vulnerability assessment' how the proposal is likely to be impacted by projected coastal hazards under climate change⁵⁶.

56 Gibson, H 'Climate Change and Low Lying Areas – Considerations in VCAT', *Planning and Climate Change Conference*, 20 October 2009, page 2, available at <http://www.law.monash.edu.au/regstudies/seminars.html>

- (13) Recent VCAT decisions demonstrate how the new policy emphasis on climate change and coastal hazards is being applied in practice.

5.2 Victorian case law - *Myers v South Gippsland Shire Council*

- (1) In *Myers v South Gippsland Shire Council*⁵⁷, an objector challenged the Council's decision to grant a permit for the subdivision of an existing lot in Waratah Bay into two lots. The applicant contended that since the *Gippsland Coastal Board v South Gippsland Shire Council* case and the release of the VCS, the importance of climate change issues had been elevated. The Tribunal concluded that a Coastal Hazard Vulnerability Assessment (**CHVA**) should be provided prior to making a decision in relation to the permit application, and consequently granted the permit applicant leave to prepare the CHVA.
- (2) The Tribunal referred to the General Practice Note⁵⁸ (which states that planning for the impacts of climate change on coastal hazards needs to be considered for rezoning amendments and individual developments), and noted that perhaps the policy should apply to other situations as well.
- (3) In the Tribunal's final hearing of the matter⁵⁹, the Tribunal was presented with expert evidence that indicated by 2100, without mitigation measures, there would be no dune, no foreshore access, no road and the subject site would be inundated by sea water. The Tribunal considered that in the absence of any strategy or work being undertaken in the Waratah Bay area on how this issue is to be addressed, the Tribunal must adopt a precautionary approach consistent with the General Practice Note. It held that to grant a permit in such circumstances would result in a poor planning outcome that would unnecessarily burden future generations.
- (4) The Tribunal stated:

While we recognise the policy drivers are for action now rather than later, we also recognise, as was stated in the interim reasons, that to address the issue of coastal vulnerability on a lot

57 [2009] VCAT 1022

58 *Managing Coastal Hazards and the Coastal Impacts of Climate Change* General Practice Note, December 2008

59 [2009] VCAT 2414

by lot or development by development basis is a heavy burden for applicants to bear...at the very minimum a regional, if not State wide approach is to be preferred. Such an approach should assess issues and potential remedial actions, be they engineering or planning based, and seek to produce a co-ordinated response⁶⁰.

5.3 Victorian case law - *Ronchi & Campbell v Wellington Shire Council*

- (1) In *Ronchi & Campbell v Wellington Shire Council*⁶¹, the Tribunal held that a CHVA was required for a proposal to construct two dwellings on a property in Seaspray. The Tribunal did not accept arguments by the Council and the permit applicant that clause 15.08 should not be applied, or should be dealt with by permit conditions.
- (2) The Tribunal also noted that the development of single dwellings that do not require a planning permit may avoid a CHVA, even if the development is in an area at risk. The Tribunal suggested that this 'gap' be addressed through a planning scheme amendment.

5.4 Victorian case law - *Bernhard Seifert v Colac-Otway Shire Council*

- (1) In *Bernhard Seifert v Colac-Otway Shire Council*⁶², the Tribunal ordered that a permit be issued for the subdivision of a property in Apollo Bay into two lots. It was common ground between the parties that there were significant challenges in terms of the potential development of the proposed new lower lot 2, which fronted on to the Great Ocean Road. However, the applicant tendered two expert reports dealing with flooding and coastal engineering issues that demonstrated how those issues could be managed.
- (2) The Tribunal stated that it was adopting the same approach taken by the Tribunal in the *Gippsland Coastal Board v South Gippsland Shire Council* case. It stated:

60 at [10]

61 [2009] VCAT 1206

62 [2009] VCAT 1453

In particular, we are applying the precautionary principle and are very mindful of the anticipated 800mm rise in sea levels and resulting potential for coastal inundation particularly in combination with a 1:100 ARI peak tide. Common sense tells us that, following this approach, the Tribunal should not approach coastal developments that are likely to be unduly threatened by future flooding and/or coastal inundation, creating a mess to be dealt with by future generations⁶³.

- (3) Although the Tribunal ordered that a permit issue, it imposed conditions on the permit including increased setbacks from the Great Ocean Road, the deletion of the proposed building envelope and the insertion of a 'building exclusion zone' at the front of the lot.

5.5 **Victorian case law - *Owen v Casey City Council***

- (1) In *Owen v Casey City Council*⁶⁴, the Tribunal held that a CHVA was required for an application for a permit for the development of two dwellings. The Tribunal noted that a CHVA for small developments can seem unduly onerous for a proponent. However, State policy made it clear that the wider risks and consequences for the community demanded this matter to be addressed in assessing permit applications.

5.6 **Victorian case law - *W&B Cabinets v Casey City Council***

- (1) The case of *W&B Cabinets v Casey City Council*⁶⁵ involved an application for a permit for the development of 22 dwellings in Tooradin. The Council sought the Tribunal's advice as to whether a CHVA was required. The Tribunal discussed clause 15.08 and relevant policy documents. Ultimately it held that it was satisfied on the basis of the advice received from Melbourne Water that the relevant assessment as required by those policy documents had been carried out and that appropriate limitations on development had been suggested. Therefore, a CHVA was not required.

63 At [49]

64 [2009] VCAT 1946

65 [2009] VCAT 2072

5.7 Victorian case law - *Tauschke v East Gippsland Shire Council*

- (1) *Tauschke v East Gippsland Shire Council*⁶⁶ involved an application for a permit authorising the subdivision of land into two lots. The East Gippsland Catchment Management Authority (**EGCMA**) (a referral authority) imposed a condition that required the building envelope on one of the lots to be above the 1.6m AHD contour. Only a small portion of the relevant lot was above that contour. Therefore, the practical effect of the condition was to deny the development of that lot.
- (2) The permit applicant appealed against the imposition of the EGCMA's condition. At the hearing, it tendered evidence based on more accurate information regarding site levels than the EGCMA had produced. The applicant also proposed an alternative condition that regulated the floor levels of the building on the relevant lot.
- (3) The Tribunal concluded that the applicant's proposed alternative condition was based on the most up to date information about site levels and it applied a responsible degree of precaution to anticipated sea level rise and other coastal hazards in accordance with clause 15.08. Therefore, it ordered that the condition imposed by the EGCMA be deleted and replaced with the applicant's proposed condition.
- (4) The Tribunal noted that there is no provision or policy in the planning scheme that prohibits infill subdivision that is intended for a single dwelling on land in a Residential 1 Zone. Instead, applications are individually assessed on the merits and circumstances of their particular case. The Tribunal stated:

If the EGCMA seeks a broad prohibition of residential development and subdivision in a Residential 1 Zone in its catchments it should consider using a more appropriate mechanism to restrict development. One approach may be to seek an Urban Floodway Zone in a planning scheme amendment process, where all affected parties have an opportunity to fully debate the implications of this approach in an open and

⁶⁶ [2009] VCAT 2231

transparent forum before an independent body. To apply a de-facto prohibition on development in a planning permit condition on an ad hoc basis may lead to uncertainty in the application of planning provisions as they currently exist in the East Gippsland Planning Scheme⁶⁷.

5.8 **Victorian case law - *Wade v Warrnambool City Council & Anor***

- (1) The Tribunal in *Wade v Warrnambool City Council & Anor*⁶⁸ upheld an application to review the Council's decision to issue a permit for the subdivision of land into three lots and the construction of a double storey dwelling on Lot 1.
- (2) The Tribunal referred to clause 15.08 and stated that while the scale and type of assessment will vary from case to case, it is preferable for plans to be prepared after a CHVA so that the design response can be informed by the findings. In this case, the Tribunal found that there was no indication that climate change issues had informed the Council's decision to issue the permit. As there had been insufficient consideration of this issue, the Tribunal held that no permit should issue.

5.9 **Commentary on Victorian case law**

- (1) The VCAT cases discussed above primarily involve the Tribunal making a decision as to whether a CHVA is required. To date there have been relatively few cases where the Tribunal has had to analyse coastal hazard evidence⁶⁹. In time we can expect the Tribunal to be more regularly asked to scrutinise CHVAs and make decisions about what is an acceptable level of risk for coastal developments.
- (2) The VCAT cases demonstrate that the policy and legislative void that existed when the *Gippsland Coastal Board* case was decided still prevails, despite changes to the policy framework. The true situation is

67 At [42]

68 [2009] VCAT 2177

69 The only cases that the author could identify were *Bernhard Seifert v Colac-Otway Shire Council* [2009] VCAT 1453, *Tauschke v East Gippsland Shire Council* [2009] VCAT 2231 and *Myers v South Gippsland Shire Council (No. 2)* [2009] VCAT 2414

that policy is being developed on the run on a case by case basis rather than at a governmental level.

- (3) The current state of the planning and policy framework leaves to VCAT the role of determining whether there will or will not be adverse effects arising from climate change. As the cases thus far demonstrate, future cases will be decided following a “battle of the experts” type hearing. This is a common enough occurrence in the planning list at VCAT, but coastal climate change issues differ from a standard disagreement between, for example, traffic engineers, in that even among climate change believers there remains considerable debate about the appropriate methodological approach to the science.
- (4) In this instance, VCAT is arguably not the appropriate place to be setting the benchmarks on a case by case basis.
- (5) Coastal vulnerability assessments are one way of identifying the issues. The critical question is what to do once the issues are identified.
- (6) What is most important (to ensure that the planning system operates fairly) is to ensure that decisions in relation to issues are consistent - that like cases be treated in a similar way. Leaving this decision making to VCAT to resolve on a case by case basis in the context of the current framework does not ensure consistency of decision making but instead lays the groundwork for a series of inconsistent decisions.
- (7) The Deputy President in charge of the Planning and Environment List at VCAT has noted that:

In 12 months the issue of sea level rises due to climate change as a reason for rejecting a development proposal has gone from being headline news to being an established part of the planning decision making framework. VCAT is regularly applying the new policies and the requirement for coastal vulnerability assessments in practical terms...

...There are too many risks for the community (present and future) and the environment for decision makers to leave it entirely up to developers and future purchasers (and their

insurance companies) to make their own assessment of the risks of the environment on private development or to accept potential future risk for the sake of present gain⁷⁰.

6. Victorian cases - Panel reports

6.1 The release of the VCS and associated policy documents has influenced the recommendations made by Planning Panels Victoria regarding planning scheme amendments.

6.2 Two recent Panel reports that comprehensively deal with climate change issues are the Panel reports for Amendment C68 to the East Gippsland Planning Scheme and Amendment C45 to the South Gippsland Planning Scheme.

6.3 Amendment C68 to the East Gippsland Planning Scheme

- (1) The Panel report for Amendment C68 was released in April 2009.
- (2) The Amendment covered hundreds of kilometres of coastline and 12 coastal towns. It covered coastal land in East Gippsland Shire stretching from west of Paynesville on the Ninety Mile Beach to the NSW border past Mallacoota.
- (3) The Amendment represented the statutory implementation phase of two strategic planning studies adopted by the Council: the Coastal Spaces Landscape Assessment Study and the Coastal Towns Design Framework Study which produced Urban Design Frameworks for the coastal towns. It proposed six Significant Landscape Overlay (**SLO**) schedules and four Design and Development Overlay (**DDO**) schedules, as well as extensive changes to the Local Planning Policy Framework to introduce reference to climate change and sea level rise issues.
- (4) The Amendment was drafted and exhibited before the release of the VCS and accompanying documents and before the approval of Amendment VC52, however the Panel hearing occurred after these events.

70 Gibson, H 'Climate Change and Low Lying Areas – Considerations in VCAT', *Planning and Climate Change Conference*, 20 October 2009, page 10, available at <http://www.law.monash.edu.au/regstudies/seminars.html>

Nevertheless, the Panel concluded that the Amendment was broadly consistent with State policy.

- (5) The Panel stated that while the State has primary responsibility for dealing with the issue of sea level rise and providing planning guidance, that does not preclude a planning authority taking responsible steps independent of the State. The Panel strongly recommended that the East Gippsland Shire Council take more definitive action on this matter. Accordingly, while it recommended that the Amendment proceed, it also recommended that the elements of the Amendment relating to sea level rise and other coastal processes be strengthened.
- (6) For example, it recommended that the DDO schedule contain a requirement for a CHVA to be prepared for any development on land below 0.8m AHD. It acknowledged that the 0.8m AHD trigger may have to be a considerably greater figure to account for storm events. However, until more information became available about this aspect of coastal processes, a trigger relating to sea-level rise alone would have to suffice. The Panel also acknowledged that it may well be preferable for there to be a State permit trigger of this kind that would apply to all Victorian coastal land.
- (7) The Panel recommended that the DDO schedules be amended so that a Climate Change Response Plan must be submitted with permit applications. The plan would contain:
 - (a) a description of the physical characteristics of the property and the anticipated changes to be brought about by coastal processes including their timing; and
 - (b) a description of the actions proposed to address risks such as loss of communications and other infrastructure, water damage to buildings, risk of drowning etc.
- (8) The owner would also be required to enter into a section 173 agreement pursuant to which the owner commits to complying with the requirements of the Climate Change Response Plan.

- (9) The Amendment has not yet been determined by the Minister.
- (10) This panel report represents an interesting examination of one way to approach climate change issues.

6.4 **Amendment C45 to the South Gippsland Planning Scheme**

- (1) The Panel report for Amendment C45 was released in June 2009.
- (2) Like Amendment C68 to the East Gippsland Planning Scheme, this Amendment represented the statutory implementation phase of the Coastal Spaces Landscape Assessment Study and the Coastal Towns Design Framework Study which produced Urban Design Frameworks for the coastal towns of Sandy Point, Tarwin Lower, Venus Bay and Waratah Bay.
- (3) The Amendment proposed changes to the Municipal Strategic Statement, including incorporating reference to climate change and coastal hazards. It also proposed the introduction of SLOs, DDOs and Environmental Significance Overlays (**ESOs**) over various areas.
- (4) The Amendment was prepared and exhibited before the release of the VCS and the approval of Amendment VC52, but the hearing occurred after these events.
- (5) The Panel endorsed the view that State-wide responses to climate change issues, possibly via a State-wide planning scheme provision or model overlay, are required as a matter of urgency. It also commented that specific measures to address coastal hazards were not exhibited as part of this Amendment.
- (6) The Panel stated that requirements for permits (and therefore the opportunity to manage the risks associated with coastal hazards) should not be reduced as proposed under the Amendment.

- (7) It recommended that:
- (a) the ESO3 and ESO7 be modified to incorporate objectives and decision guidelines to ensure the consideration of development applications has regard to and responds to coastal hazards.
 - (b) the planning authority consider specifying a requirement in ESO3 and ESO7 for applications relating to land within 1 kilometre of the coast, within a coastal reserve or less than 5m AHD to include a CHVA and, as appropriate, a Climate Change Response Plan.
 - (c) the extent of ESO3 be reviewed, when sufficient information is available, to include areas vulnerable to coastal hazards.
- (8) The Panel noted that the Panel considering Amendment C68 to the East Gippsland Planning Scheme recommended all of the proposed overlays trigger a requirement to obtain a permit where the land upon which the buildings and works are to be constructed is less than 0.8m (or 1.0m) AHD.
- (9) The Panel stated:

We are conscious that such a trigger would not capture properties (and access to them) currently subject to inundation as the AHD level is based on mean sea level rather than extreme events, storm surge and the like. ...As all of the settlements being considered are within 1 kilometre of the coast, it would suffice to relate the permit requirement under ESO7 to the 5m AHD level...We emphasise that the proposed permit trigger should not be interpreted as indicating that a property is necessarily vulnerable to coastal hazards. Rather, it provides a mechanism to ensure the issue is considered and, where a significant risk is identified, to enable appropriate responses to that risk⁷¹.

- (10) The Amendment has not yet been approved by the Minister.
- (11) Again, this panel report represents the consequences of a failure by the State to provide any systematic guidance about the way to approach regulation in relation to climate change issues.

7. Legislation, policy and cases from other Australian jurisdictions

7.1 South Australia

(1) South Australian legislation and policy

- (a) The legislative framework for the South Australian planning and development system is established by the *Development Act 1993* (SA). A Development Plan is the key statutory planning document in the South Australian system. There is a Development Plan for each local Council in the State. Each Development Plan contains general provisions (usually called 'Objectives' and 'Principles of Development Control') that apply throughout the area covered by the plan, and zoning maps and zoning provisions that contain detailed policy applying to each zone within the Development Plan.
- (b) The principal legislation in South Australia relating to coastal development is the *Coast Protection Act 1972* (SA). The stated purpose of this Act is to provide for the conservation and protection of the beaches and coast of South Australia. Among other things, the Act establishes the Coast Protection Board⁷².
- (c) The 2004 *Living Coast Strategy for South Australia*⁷³ was developed to build on the State Government's previous policy document, *Our Seas and Coasts: A Marine and Estuarine Strategy for South Australia*. An objective of the strategy is to provide a legislative and policy framework for ecologically sustainable development (ESD) and use of coastal, estuarine and marine environments. Among other things, the strategy suggests that a risk assessment of coastal hazards be undertaken, to inform the development of a Coast Protection Strategy for the whole of the South Australian coast.

⁷² Section 6

⁷³ www.environment.sa.gov.au/coasts/pdfs/living_coast.pdf

(d) South Australia was the first state to adopt standard planning scheme provisions addressing the risk of climate change, as a result of the Coast Protection Board's 1992 *Coastline: Coastal Erosion, Flooding and Sea Level Rise Standards and Protection Policy*⁷⁴. In 1994, all Development Plans were amended to introduce provisions that addressed the Board's policy. The provisions addressed matters such as environmental protection, the preservation of scenic heritage and other values, maintenance of public access and hazard risk minimisation. The hazard risk minimisation provisions included a consideration of sea level rise induced by climate change.

(e) More recently, the Coast Protection Board has endorsed the 2002 *Coast Protection Board Policy Document*⁷⁵, which states:

*On the basis of the IPCC projections the Board is recommending that a mid-range sea level rise of 0.3m by the year 2050 be adopted for most coastal planning and design. It should be noted that the 0.3m figure includes continuation of the present rate of rise and is not additional to it. While sea level rise due to climate change is likely to continue beyond 2050, projections for the following 50 years to 2100 are less certain. The Board has adopted a 1m rise to 2100 for coastal policy, in the sense that this will only be applied for development, which could not reasonably be protected against this greater rise*⁷⁶.

(f) The Coast Protection Board has convened a Sea Level Rise Committee to undertake a review of the 2002 policy.

(g) Therefore, unlike in some other states, all relevant South Australian Development Plans contain provisions dealing with sea level rise and coastal hazards.

74 www.deh.sa.gov.au/coasts/pdfs/no26.pdf

75 <http://www.environment.sa.gov.au/coasts/about-us/coast-protection-board.html>

76 Page 47

- (h) For example, the Port Augusta Development Plan contains the following objectives:

Objective 59: Development only located, designed and undertaken on land which is not subject to, or can be appropriately protected from, hazards to coastal development such as inundation by storm tides or combined storm tides and stormwater, coastal erosion and sand drift; including an allowance for changes in sea level due to natural subsidence and predicted climate change during the first 100 years of the development.

Objective 60: Development which will not require, now or in the future, public expenditure on protection of the development or the environment by developers bearing the costs of protecting private development from the effects of coastal processes or the environment from the effects of development rather than the community... Development should also be capable of being protected against a further sea level rise, and associated erosion, of 0.7 metres between 2050 and 2100.

Objective 63: To re-develop and redesign unsatisfactory coastal living areas which do not satisfy environmental, health or public access standards for coastal areas.

Objective 64: Protect the coast from development that will adversely affect the marine and onshore coastal environment whether by pollution, erosion, damage or depletion of physical or biological resources, interference with natural coastal processes or any other means.

- (i) The Port Augusta Development Plan then contains relevant Principles of Development Control, including principles relating to environmental protection, hazard prevention and the protection of physical and economic resources. The hazard prevention principles contain detailed regulations regarding issues such as set backs, floor levels and the width of erosion buffers.

- (j) The Development Plan also provides for a Coastal Holiday Settlement Zone. It provides that development proposals for land within the zone should be referred to the Coastal Settlement Board. It also sets out detailed Objectives and Principles of Development Control that apply to development proposals in that zone.

(2) **South Australian case law**

- (a) The principal case on coastal planning and climate change in South Australia is *Northcape Properties Pty Ltd v District Council of Yorke Peninsula*⁷⁷. The case stemmed from a decision by the Council to refuse development permits for the subdivision of a property into 78 lots and 2 reserves. One of the grounds of the refusal was that the proposal offended provisions of the relevant Development Plan relating to coastal reserves and development near the coast.
- (b) The Development Plan included various principles that were relevant to the proposed development. One relevant principle was that development should be set-back a sufficient distance from the coast to provide an erosion buffer which would allow for at least 100 years of coastal retreat for small-scale developments, or 200 years of retreat for large-scale developments, unless certain conditions were met⁷⁸.
- (c) The applicant applied to the Environment Resources and Development Court (**ERDC**) for a review of the Council's decision. Commissioner Mosel of the ERDC upheld the Council's decision, and the applicant filed an appeal with the Supreme Court.
- (d) Justice DeBelle of the Supreme Court dismissed the appeal. His Honour held that the Development Plan expressed a clear intention that subdivision and other forms of development closely

77 [2008] SASC 57

78 Principle 31 – Principles of Development Control for Coastal Development

bordering the coast should make due allowance, where appropriate, for coastal erosion and the provision of both an erosion buffer and a coastal reserve.

- (e) Commissioner Mosel had accepted evidence that over the next 100 years the coastline would shift inland by 35-40m. The Commissioner had also noted that with the coastline receding to this degree, the high water mark would intrude onto part of the lot intended to serve as a coastal reserve. Justice Debelle accepted these findings and concluded:

This proposal offends so many of the goals and objectives of the Development Plan that development consent must be refused. The proposal is on any view an attempt to develop the land to the greatest extent possible without due regard to the ecological sensitivity of the area and the need to preserve natural features⁷⁹.

- (f) *Johnson Trading Industries Pty Ltd v Port Pirie Regional Council*⁸⁰ concerned a permit for the development of several dwellings. The permit applicant appealed against the imposition of a condition that required the finished floor level of the dwellings to be no lower than 3.4m AHD.
- (g) Commissioner Botting referred to the 'coastal development' objectives in the Development Plan, including:
- (i) Objective 65 – 'Development which recognizes and allows for hazards to coastal development such as inundation by storm tides or combined storm tides and stormwater, coastal erosion and sand drift; including an allowance for changes in sea level due to natural subsidence and predicted climate change during the first 100 years of the development'.

79 at 28
80 [2007] SAERDC 42

- (ii) Objective 75 – ‘Development only undertaken on land which is not subject to, or can be appropriately protected from, coastal hazards such as inundation by storm tides or combined storm tides and stormwater, coastal erosion or sand drift’.
 - (h) The Commissioner held that these objectives provided support for the need to provide an adequate level of protection against flooding to the proposed dwellings by setting a minimum floor level. However, in this case the Commissioner considered that a minimum floor level of 2.70m AHD (as opposed to 3.40m AHD) would be sufficient to comply with these objectives.
- (3) Points of interest regarding the South Australian response to climate change and coastal planning issues

Points of interest regarding the South Australian response include:

- (a) Development Plans in South Australia include relatively detailed ‘Principles of Development Control’ to control developments in areas at risk of coastal hazards, including in relation to floor levels and buffer zones.
- (b) South Australia has implemented a ‘Coastal Holiday Settlement Zone’ which implements further regulations relating to coastal developments.
- (c) South Australia is planning for a 1.0m sea level rise by 2100.

7.2 New South Wales

(1) NSW legislation and policy

- (a) In NSW, Local Environment Plans (**LEPs**) guide planning decisions for local government areas through zoning and development controls. LEPs must be prepared in accordance with the *Environment Planning and Assessment Act 1979* (NSW). When making a decision on a development application, a consent authority must consider the provisions of any environmental planning instrument (including any LEP) that applies to the land to which the application relates⁸¹.
- (b) In 2006, the NSW Government gazetted a standard instrument for preparing new LEPs. The Government is working with Councils in an attempt to make all LEPs based on the standard instrument as soon as practicable.
- (c) Clause 5.5 of the Standard Instrument prevents the granting of development consent on land that is wholly or partly within the NSW coastal zone, unless consideration has been given to the effect of the impact of coastal processes and hazards on the proposed development. Therefore, in due course this clause will be included in the LEPs for all areas within NSW.
- (d) The principal Act relating to coastal protection in NSW is the *Coastal Protection Act 1979* (NSW). The Act contains provisions regulating development in the coastal zone⁸², including providing for the preparation of coastal zone management plans by Councils. The preparation of a coastal zone management plan is

81 Section 79C

82 'Coastal zone' is defined in section 4 to mean:

(a) the area within the coastal waters of the State as defined in Part 10 of the *Interpretation Act 1987* (including any land within those waters), and

(b) the area of land and the waters that lie between the western boundary of the coastal zone (as shown on the maps outlining the coastal zone) and the landward boundary of the coastal waters of the State, and

(c) the seabed (if any) and the subsoil beneath, and the airspace above, the areas referred to in paragraphs (a) and (b)

discretionary, unless the Minister directs that a plan must be prepared⁸³.

- (e) Under the *Coastal Protection Act*, a public authority is *prohibited*, without the concurrence of the Minister, from carrying out any development in the coastal zone or granting any consent to a person to use or develop land in the coastal zone if, in the opinion of the Minister, the use or development may be inconsistent with the principles of ESD⁸⁴.
- (f) The 1997 *NSW Coastal Policy*⁸⁵ was designed to guide management and planning of the coastal zone. The policy states that it uses the precautionary principle as an integrating mechanism for considering and addressing a range of issues in the coastal zone.
- (g) More recently, the NSW Government has released the 2009 draft *Sea Level Rise Policy Statement*⁸⁶ for public comment. Two of the objectives of the policy are that natural processes and hazards are given a high priority, and that climate change is recognised and considered. The policy sets a sea level rise planning benchmark to support an adaptive risk-based approach. The benchmark is an increase above 1900 mean sea levels of 40cm by 2050 and 90cm by 2100.
- (h) The NSW Government has also released the draft *NSW Coastal Planning Guideline: Adapting to Sea Level Rise*⁸⁷. The guideline adopts the sea level rise planning benchmark specified in the draft *Sea Level Rise Policy Statement*.
- (i) Under section 117 of the *Environment Planning and Assessment Act*, the relevant NSW Minister may direct a public authority to exercise its functions under the Act in accordance with the

83 Section 55B

84 Section 38(1)

85 <http://www.planning.nsw.gov.au/PlansforAction/Coastalprotection/NSWCoastalPolicy/tabid/173/Default.aspx>

86 <http://www.environment.nsw.gov.au/resources/climatechange/09708sealevrisepolicy.pdf>

87 <http://www.planning.nsw.gov.au/LinkClick.aspx?fileticket=1Mz7Sun64mw%3D&tabid=177>

direction. The Minister has used this power to make directions that are relevant to coastal planning:

- (i) *Direction 2.2 – Coastal Protection*⁸⁸ applies to the coastal zone, as defined in the *Coastal Protection Act*. It provides that when a Council prepares a draft LEP it must include provisions that give effect to and are consistent with the *NSW Coastal Policy* and other relevant guidelines and manuals, unless the inconsistency is justified by an environmental study or strategy.
- (ii) *Direction 4.3 – Flood prone land*⁸⁹ applies when a Council prepares a draft LEP that creates, removes or alters a zone or a provision that affects flood prone land. It requires that planning proposals must include provisions that give effect to and are consistent with the *Flood Prone Land Policy* and the related manual.
- (j) *State Environmental Planning Policy 71: Coastal Protection*⁹⁰ (which was made under the *Environment Planning and Assessment Act*) also requires Councils to consider the impact of coastal processes and coastal hazards when preparing LEPs and assessing development⁹¹ in the NSW coastal zone⁹².
- (k) Individual Councils have also developed their own climate change policies and strategies.
- (l) For example, the Byron Shire Council has prepared the draft *Climate Change Strategic Planning Policy*⁹³, which provides climate change flood planning scenarios for the years 2050 and 2100 that are to be applied when making planning decisions.

88 <http://www.planning.nsw.gov.au/LocalEnvironmentalPlans/LocalPlanningDirections/tabid/248/Default.aspx>

89 <http://www.planning.nsw.gov.au/LocalEnvironmentalPlans/LocalPlanningDirections/tabid/248/Default.aspx>

90 http://www.austlii.edu.au/au/legis/nsw/consol_reg/seppn71p578/

91 Regulations 7 and 8

92 The 'coastal zone' is defined by reference to coastal zone maps.

93 <http://www.byron.nsw.gov.au/climate-change>

- (m) The draft policy refers to a series of climate change parameters and provides that a 100 year planning period must be used for any strategic, infrastructure and operational planning document or design that may be affected by climate change. It also refers to the need for appropriate buffering of natural ecosystems to be incorporated into strategic plans, land use controls and development proposals.
- (n) The policy also provides for the establishment of a uniform 20m buffer between the erosion escarpment and human settlement, and imposes other conditions on development in coastal hazard areas.
- (o) Byron Shire Council has also prepared a draft *Coastal Zone Management Plan* under the *Coastal Protection Act*⁹⁴, which it considers will improve the implementation of Council's policy of planned retreat. Under that policy, development must be relocated or removed when the erosion escarpment encroaches to within a trigger distance of the structure. The trigger distance is influenced by whether the development is a relocatable or non-relocatable structure⁹⁵. The draft *Coastal Zone Management Plan* notes that there is a need to develop a policy to determine the issues relating to the enforcement of planned retreat in the absence of consenting 'retreat' action by the owner.
- (p) The NSW Government has designed a coastal erosion reform package to, among other things, better equip local governments with the tools required to tackle the issue of coastal erosion⁹⁶. Initiatives include:
 - (i) requiring Councils with erosion 'hotspots' to prepare coastal erosion emergency plans by 30 June 2010;

94 <http://www.byron.nsw.gov.au/czmp-public-exhibition>

95 Planned Retreat Factsheet, <http://www.byron.nsw.gov.au/czmp-public-exhibition>

96 <http://www.environment.nsw.gov.au/coasts/coastalerosionmgmt.htm>

- (ii) amending the *Coastal Protection Act*, the *Local Government Act 1993* (NSW) and various regulations to include adaptation to sea level rise as a management objective; to enable Councils that implement coastal erosion protection works to require benefiting landowners to contribute to their cost through a coastal protection service charge; and to provide new powers to enable a Council or the Minister to issue an order to stop unapproved action likely to result in significant beach erosion;
- (iii) issuing Ministerial directions to coastal Councils that have not yet completed overall coastal zone management plans to complete the plan within a fixed period; and
- (iv) amending the *Local Government Act* to clarify indemnity provisions.

(2) NSW case law

- (a) The principal NSW case on this issue is *Walker v Minister for Planning*⁹⁷. This case involved a challenge to the Minister's approval of a concept plan for the subdivision and residential development of coastal land in Sandon Point on the Illawara coast of NSW.
- (b) The applicant argued that the Minister had approved the plan without considering the impacts of climate change on the proposed development.
- (c) Section 75O of the *Environment Planning and Assessment Act* requires the Minister to consider, when approving a concept plan, the Director-General's report on the project. Clause 8B of the *Environmental Planning and Assessment Regulation 2000* (NSW) requires the Director-General to include in the Director-

97 [2007] NSWLEC 741. On appeal, *Minister for Planning v Walker* (2008) NSWCA 224

General's Report 'any aspect of the public interest that the Director-General considers relevant to the project'.

- (d) Biscoe J in the New South Wales Land and Environment Court held that the reference to 'public interest' in clause 8B included the principles of ESD. He held that by implication from the subject matter, scope and purpose of the Act, the Minister was bound to consider the climate change flood risks associated with the project.
- (e) The New South Wales Court of Appeal⁹⁸ reversed Biscoe J's decision, but upheld some of his reasoning. Hodgson JA (with whom Campbell and Bell JJA agreed) agreed that the Minister was required to consider the 'public interest' when exercising his powers under the Act, and that the principles of ESD were *now* elements of the public interest. Furthermore, his Honour agreed that consideration of ESD principles in relation to this project would have required consideration of long-term threats of serious or irreversible environmental damage, and that this almost inevitably would have involved consideration of the effect of climate change flood risk.
- (f) However, his Honour considered that at the time the Minister made his decision (some years before the case was heard) ESD principles were *not* elements of the public interest. Therefore, the Minister's decision could not be avoided on that basis.
- (g) In *Aldous v Greater Taree City Council*⁹⁹, Biscoe J in the Land and Environment Court dismissed an application challenging the validity of a development approval granted by the Greater Taree City Council for the construction of a dwelling on a beachfront property. The applicant argued that the Council had failed to take into account the principles of ESD. In particular, the applicant argued that the Council failed to take into account climate change induced coastal erosion.

98 *Minister for Planning v Walker* [2008] NSWCA 224
99 [2009] NSWLEC 17

- (h) Biscoe J noted that section 79C of the *Environment Planning and Assessment Act 1979* (NSW) required the Council to take into account the public interest when determining whether to grant development consent. His Honour also noted that the 'public interest' includes the principles of ESD.
 - (i) His Honour concluded that the Council had taken the principles of ESD into account, given that Council had:
 - (i) adopted a Coastal Management Plan;
 - (ii) sought advice from the Department of Land and Water Conservation on whether previous advice received from the Department regarding the 100 year coastline should be re-assessed in light of climate change, and had been advised that the advice was still applicable; and
 - (iii) taken steps to prepare a coastal zone management plan for the area where the property was located.
 - (j) *Van Haandel v Byron Shire Council*¹⁰⁰ concerned an application for a permit to construct a dwelling on land that was highly susceptible to coastal erosion. The local environmental planning instruments required the Council to consider the likelihood of the proposed development adversely affecting or being adversely affected by coastal processes. The Council had also adopted a policy of planning retreat. Commissioner Brown of the Land and Environment Court upheld the Council's decision to refuse consent.
- (3) Points of interest regarding the NSW response to climate change and coastal planning issues
- (a) Points of interest regarding the NSW response include:
 - (i) NSW is planning for a sea level rise of 90cm by 2100.

100 [2006] NSWLEC 394

- (ii) The *Coastal Protection Act* provides for the preparation of coastal management plans by Councils. The Minister can direct a Council to prepare such a plan.
- (iii) The *Coastal Protection Act* contains a prohibition on development that the Minister considers may be inconsistent with the principles of ESD.
- (iv) The draft Byron Shire Council *Climate Change Strategic Planning Policy* provides for the establishment of a uniform 20m buffer between the erosion escarpment and human settlement, and imposes other conditions on development in coastal hazard areas. The Council has adopted a policy of planned retreat.
- (v) NSW is intending to pursue further legislative amendments to assist the implementation of its State policies, for example to allow Councils to implement a coastal protection service charge, and to issue stop-work orders for actions likely to result in significant erosion.

7.3 Queensland

- (1) Queensland legislation and policy
 - (a) The *Sustainable Planning Act 2009* (Qld) will come into force on 18 December 2009, replacing the *Integrated Planning Act 1997* (Qld).
 - (b) The *Sustainable Planning Act* provides for the development of state planning instruments, namely state planning regulatory provisions, regional plans, state planning policies and standard planning scheme provisions. The Act also provides for the preparation of planning schemes by local governments. State planning instruments prevail over local planning instruments to the extent of any inconsistency. New planning schemes must comply with the standard planning scheme provisions.
 - (c) The principal Act regulating coastal planning in Queensland is the *Coastal Protection and Management Act 1995* (Qld). Objectives of the Act include requiring planners and developers to have regard to the goals, core objectives and guiding principles of the *National Strategy for Ecologically Sustainable Development*¹⁰¹ in using the coastal zone, and co-ordinating and integrating management for ESD in the coastal zone¹⁰². The Act provides for the development of a State Management Plan for the coastal zone¹⁰³, as well as Regional Management Plans.
 - (d) The State Management Plan and Regional Management Plans prepared under the *Coastal Protection and Management Act* are treated as state planning policies for the purposes of the *Integrated Planning Act*. This means that 'assessment managers'

101 Ecologically Sustainable Development Steering Committee (1992) *National strategy for ecologically sustainable development*, Australian government publishing service, Canberra

102 Section 3

103 The coastal zone means—

(a) coastal waters (defined to mean Queensland waters to the limit of the highest astronomical tide; or

(b) all areas to the landward side of coastal waters in which there are physical features, ecological or natural processes or human activities that affect, or potentially affect, the coast or coastal resources (ss 13 and 15)

(usually Councils) must take them into account when making or amending local planning instruments, when assessing development applications and when designating land for community infrastructure¹⁰⁴.

- (e) The *Coastal Protection and Management Act* also provides for the declaration of coastal management districts¹⁰⁵. In relation to activity in a coastal management district, the chief executive may issue a direction that a person take the reasonable action stated in the notice, or to stop an activity that the CEO considers is likely to have a significant effect on coastal management or cause wind erosion¹⁰⁶.
- (f) Part 6 of the Act applies if the chief executive is the assessment manager or a concurrence agency for a development application. It provides that the chief executive may include a condition that a part of the lot in the coastal management district must be surrendered to the State for coastal management if the chief executive thinks that the land is in an erosion prone area or within 40m of the foreshore¹⁰⁷. No compensation is payable for a land surrender condition, and a decision to impose such a condition cannot be appealed¹⁰⁸.
- (g) The *State Coastal Management Plan* commenced in February 2002. It provided that in assessing coastal erosion prone areas, decision-makers should assume a 30cm rise in sea level over a 50 year planning period.
- (h) A draft *Queensland Coastal Plan*¹⁰⁹ has now been prepared. The public consultation period ended at the end of November 2009. The plan is intended to give greater certainty about dealing with coastal hazards such as erosion and sea-level rise and managing

104 Section 50 of the *Coastal Protection and Management Act*.

105 Part 3

106 Section 59

107 Section 110

108 Section 115

109 <http://www.derm.qld.gov.au/coastalplan/>

the pressures of population and development. The plan comprises:

- (i) a draft *State Policy - Coastal Management*, which provides policy guidance for effective maintenance, rehabilitation and protection activities on coastal land; and
 - (ii) a draft *State Planning Policy - Coastal Protection (SPP)*, which is intended to address land use planning and development assessment decision making within the coastal zone. The policy provides that coastal hazard risk assessments are to be based on specified climate change parameters, including projected sea level rise of 0.8 metres by 2100 due to climate change (relative to 1990 value) and a 10 per cent increase in cyclone intensity (relative to maximum potential intensity).
 - (iii) The SPP will inform the preparation and amendment of State and local planning instruments. Where the SPP is not reflected in a planning instrument, developments covered by the SPP will be required to address the relevant outcomes in the SPP.
 - (iv) a series of accompanying maps that illustrate the coastal zone, coastal management districts, areas of high ecological significance and maritime development areas.
- (i) Climate change is also being addressed at a regional level. For example, the draft *South East Queensland Climate Change Management Plan* includes actions to build resilience to climate change such as:
- (i) acquiring fine-scale digital elevation data for coastal areas for use in assessing risk and mapping hazard-prone areas;

- (ii) preparing and publishing regional and local-scale risk assessments and maps of coastal hazard-prone areas;
 - (iii) developing guidelines for the preparation of hazard and risk maps including the projected effects of climate change on natural hazards; and
 - (iv) preparing local-scale climate-resilient urban planning and design guidelines and performance criteria for sensitive areas.
- (j) The plan also contains actions relating to reducing greenhouse gas emissions in relation to transport and settlement patterns, energy efficiency, renewable energy, carbon storage, waste emissions and community awareness and behaviour.
- (2) Queensland case law
- (a) Cases in Queensland have demonstrated the importance of establishing appropriate guidelines addressing climate change issues within planning instruments.
 - (b) *Daikyo (North Queensland) Pty Ltd v Cairns City Council*¹¹⁰ concerned a residential housing, tourist accommodation and commercial development in Palm Cove in far north Queensland. The site was at risk of cyclones.
 - (c) In granting approval for the development, the Council imposed a condition that was consistent with its planning scheme, which provided for floor levels to be at a specified level to deal with coastal hazards. Daikyo appealed against the imposition of the condition. An objector, Dr Nott, argued that more stringent conditions were required due to the risk of coastal hazards.
 - (d) Skoein J in the Planning and Environment Court allowed Daikyo's appeal. His Honour stated:

110 [2003] QPEC 22

It may be...that Dr Nott's research will one day change the way we look at the effect of cyclones, but it is not the Court's functions to pre-empt proper consideration by the Council and other relevant bodies of that research. A responsible Council, in making land use planning decisions, takes into account other factors such as risk acceptable, emergency planning measures and community economics. This Court is not charged with that type of, or degree of, planning¹¹¹.

- (e) His Honour held that the relevant condition secured compliance with the Council's adopted standard. Furthermore, the imposition of Dr Nott's preferred level would set the bar far higher than has been set for other comparable developments, and therefore it would be an unreasonable imposition on the development in this case.
- (f) A similar approach was taken in *Mackay Conservation Group Inc v Mackay City Council*¹¹². In that case, Robin J in the Planning and Environment Court was required to consider whether approval should be granted for a residential and tourism development at East Point, Mackay. The Council had granted approval subject to conditions regarding the location and floor levels of buildings, in accordance with its planning scheme.
- (g) Justice Robin refused to grant the objectors' appeal, and agreed with Skoein J's statement in *Daikyo* that:

...it is for the planning authority (which is not the Court) to undertake the balancing exercises involved in setting standards for building levels and the like...it is not the Court's responsibility to set the standard¹¹³.

111 at [24]

112 [2006] QPELR 209

113 at [67]

- (h) In *Charles & Howard Pty Ltd v Redland Shire Council*¹¹⁴ the Queensland Court of Appeal upheld a decision of the Planning and Environment Court¹¹⁵ to dismiss an appeal against certain conditions imposed by the Council on a development approval. The Council had granted the applicant approval to construct a dwelling on the subject site, but imposed a condition that the building be erected in a different location (which was less prone to tidal inundation) within the site.
- (i) The applicant appealed against the condition on the grounds that it was unreasonable.
- (j) Brabazon J in the Planning and Environment Court assessed relevant planning policies applying to the subject site. His Honour noted that a local planning policy that applied to the site had an objective of protecting residential housing from flood waters by excluding development from lands affected by the 1 in a 100 year flood. That policy provided that development should be separated from the coastal zone, wetlands or waterways by a buffer zone of between 30 and 60m.
- (k) His Honour also noted that the Strategic Plan that applied to the site mandated the consideration of climate change when assessing development approvals.
- (l) The Queensland Court of Appeal (McMurdo P, Holmes JA and Mackenzie J) held that Brabazon J was entitled to take the effects of climate change into account, by way of the strategic plan. It also held that Brabazon J was entitled to hear expert opinions in relation to whether the subject site was vulnerable to coastal hazards as a result of climate change. Therefore, the Court of Appeal dismissed the applicant's application.

114 (2007) 159 LGERA 349
115 [2006] QPEC 95

- (3) Points of interest regarding the Queensland response to climate change and coastal planning issues

Points of interest regarding Queensland's response include:

- (a) The *Coastal Protection and Management Act* contains provisions dealing with the serving of notices to prevent coastal erosion, and the surrender of land.
- (b) Queensland is planning for a projected sea level rise of 0.8m by 2100. The draft *Queensland Coastal Plan* also requires consideration of other climate change parameters, such as a 10% increase in cyclone intensity.

7.4 Tasmania

- (1) Legislation and policy
 - (a) There is no specific coastal protection legislation in Tasmania. The principal planning Act is the *Land Use Planning and Approvals Act 1993* (Tas). The Act provides for the preparation of planning schemes by local authorities, and the preparation of planning directives to ensure planning authorities apply consistent approaches to certain planning issues.
 - (b) The principal policy related to coastal protection is the *State Coastal Policy 1996*, which was made under the *State Policies and Projects Act 1993* (Tas). Under that Act, it is an offence to fail to comply with a provision of a State Policy¹¹⁶.
 - (c) Before endorsing a new or amended planning scheme, the Resource Planning and Development Commission must be satisfied that the scheme is consistent with the policy. Furthermore, where there is an inconsistency between a provision of a State Policy and a provision of a planning scheme, the provision of the planning scheme is void to the extent of the inconsistency¹¹⁷.
 - (d) The *State Coastal Policy* has proven difficult to enforce¹¹⁸. The Tasmanian Supreme Court has held that while local governments must give effect to the policy, some of the statements in the policy are not prescriptive enough to be directly enforced¹¹⁹.
 - (e) This policy was reviewed in 2004 and a draft policy was released in 2006, but later withdrawn. A revised draft policy was released in 2008¹²⁰.

116 Section 14

117 Section 13

118 House of Representatives Standing Committee on Climate Change, Water, Environment and the Arts, *Managing our coastal zone in a changing climate – The time to act is now*, October 2009, page 342

119 *St Helens Landcare and Coastcare v Break O'Day Council* [2007] TASSC 15

120 http://www.dpac.tas.gov.au/divisions/policy/state_policies

- (f) The purposes of the draft 2008 *State Coastal Policy* are to facilitate the conservation of natural, social and economic assets, values and processes of the coastal area; the sustainable use or development of the coastal area; and the satisfaction of social needs and development of culture. The draft policy sets out a series of outcomes that are designed to achieve the objectives. Relevant outcomes include ensuring that development in areas at risk from the adverse impacts of climate change occurs only where the risks are satisfactorily managed.
- (g) The draft policy provides that all statutory instruments under the Resource Management and Planning System which manage or control use or development in the coastal area, including planning schemes, management plans and marine farming development plans, must give effect to the objectives and outcomes of the policy. The policy also provides that these instruments must be reviewed in light of the policy.
- (h) In June 2009, the Premier referred the draft policy to the Tasmanian Planning Commission for full assessment and report.
- (i) The Tasmanian government is currently carrying out the *Better Planning Outcome* project¹²¹. It intends to develop standard planning provisions to implement the *State Coastal Policy* as part of this project. When completed, the provisions will be added to the existing *Planning Directive No. 1 Common Key Elements Template*, which all new planning schemes must adopt.
- (j) One of the outcomes described in the draft 2008 *State Coastal Policy* is that 'development in areas at risk from the adverse impacts of climate change, occurs only where the risks are satisfactorily managed'. To assist with achieving this outcome, the State Government is carrying out the *Climate Change and*

121 http://www.justice.tas.gov.au/landuseplanning/better_planning_outcomes

*Coastal Risk Assessment Project*¹²². This project has resulted in the production of documents such as:

- (i) a template Coastal Risk Management Plan;
 - (ii) a desk top audit of Tasmania's coastal assets potentially vulnerable to flooding and sea-level rise; and
 - (iii) a report on Sea Level Extremes in Tasmania.
- (k) The template *Coastal Risk Management Plan* was prepared to assist planners and managers to assess, analyse and manage risks to built and natural assets in the coastal zone. The template is structured to follow the Australian and New Zealand Standard for Risk Management.
- (l) To assist planners and managers adopt the risk assessment approach, the *Sea Level Extremes in Tasmania* report contains exceedance statistics relating to various coastal hazards. The report notes that planning schemes and other similar regulatory instruments most commonly use the 1% annual exceedance probability (which refers to high sea level events which have a 1% chance of occurring once or more in any one year). This method however does not always provide a realistic understanding of the chance of an event occurring over longer time periods. For example, for a development with an expected life space of around 100 years, it may be more relevant to know the chance of a particular height of sea-level being exceeded once or more during that whole 100 year span, rather than the chance of it occurring in any one of the years during that time.
- (m) Tasmanian planning schemes include overlays that specifically apply to areas at risk due to the effects of climate change, such as the Coastal Management Overlay, the Coastal Erosion Hazard Overlay or the Sea Level Rise and Storm Surge Overlay. These

122 <http://www.dpiw.tas.gov.au/inter-nsf/WebPages/HBAW-7HNVLZ?open>

overlays introduce permit requirements for certain uses and developments.

- (n) Some Councils have already undertaken coastal hazard studies, to provide a framework for responding to developing risks from climate change¹²³.

(2) **Tasmanian case law**

- (a) We have been unable to identify many decisions from Tasmania where sea level rise and climate change have been considered in detail.
- (b) In *Dobson v. Central Coast Council*¹²⁴, the Council granted a permit for a two lot subdivision at Turners Beach. An objector lodged an appeal, arguing that the Council had failed to take into account the site's vulnerability to sea level rise, and its failure to undertake a site specific assessment of this issue (in other words, a coastal hazard vulnerability assessment). The subject site was identified in a coastal hazards report as being in an area at risk due to sea level rise.
- (c) The Resource Management and Planning Appeal Tribunal noted that the coastal hazards report was not referred to in the planning scheme or any Council policies. It also accepted Council's argument that survey data for the site demonstrated that a site specific assessment of coastal hazards was not required. Therefore, it dismissed the objector's application.

(3) **Points of interest regarding the Tasmanian response to climate change and coastal planning issues**

- (a) Points of interest regarding Tasmania's response include:
 - (i) Tasmania has not adopted a uniform sea level rise figure in its planning schemes. It has adopted a risk based

123 For example, Clarence City Council - <http://www.ccc.tas.gov.au/site/page.cfm?u=807>
124 [2008] TASRMPAT 33

approach that requires the decision-maker to take into account the location and planning life of a development.

- (ii) The *Climate Change and Coastal Risk Assessment Project* is an initiative that is designed to assist decision-makers to adopt a risk based approach to decision-making in relation to the impacts of climate change. The project has resulted in the production of a series of technical documents, including a template risk management plan and a report on coastal hazard statistics.
- (iii) Tasmania has a Coastal Management Overlay, Coastal Erosion Hazard Overlay and a Sea Level Rise and Storm Surge Overlay.

7.5 Western Australia

- (1) The *Planning and Development Act 2005* (WA) provides for the development of state planning policies (previously known as statements of planning policy), as well as region planning schemes and local planning schemes.
- (2) There is no specific coastal protection legislation in Western Australia, and planning processes and codes for climate change adaptation are relatively limited in Western Australia¹²⁵.
- (3) The *Statement of Planning Policy No. 2: Environment and Natural Resource Policy* and the *Statement of Planning Policy No. 2.6: State Coastal Planning Policy* are the principal policies relating to coastal development.
- (4) The *Environment and Natural Resources Policy* defines broad principles and considerations that 'represent good and responsible planning in terms of environment and natural resource issues within the framework of the State Planning Strategy'¹²⁶. The only specific reference to climate change is the statement that planning strategies, schemes and decision making should 'support the adoption of adaptation measures that may be required to respond to climate change'¹²⁷.
- (5) The *State Coastal Planning Policy* provides guidance for decision-making on coastal planning matters. It sets out the policy measures that should be taken into account in local and regional planning strategies, structure plans, schemes, subdivisions and development applications. It provides that a coastal planning strategy or foreshore management plan should be prepared to support development proposals on the coast. It includes guidelines for setbacks required for coastal developments. The policy provides for a predicted sea level rise of 0.38m by 2100 from 2000 levels.

125 <http://www.walgaclimatechange.com.au/planning.htm>

126 Section 2

127 Section 5.10

- (6) The *Development Control Policy 6.1 – Country Coastal Planning Policy*¹²⁸ provides more specific guidelines for coastal developments. However, climate change is not mentioned in the policy.
- (7) There is no uniform approach to climate change and coastal developments in Western Australian planning schemes.
- (8) We have been unable to identify any significant Western Australian cases relating to this issue.

128 <http://www.planning.wa.gov.au/Plans+and+policies/Publications/244.aspx>

7.6 Northern Territory

- (1) There is no coastal management legislation in the Northern Territory.
- (2) The *Northern Territory Coastal Management Policy* is designed to guide management, planning and conservation in the NT coastal zone. It was initially developed in 1985, and is currently under review.
- (3) In 2003, a regional plan was developed for Darwin Harbour (the *Darwin Harbour Regional Plan of Management*). The plan advocates for five overarching goals, including the promotion of ESD and community ownership and participation in management.
- (4) The *Integrated Natural Resource Management Plan for the Northern Territory*¹²⁹ was produced following the execution of a bilateral agreement between the NT Government and the Commonwealth of Australia. The plan suggests that coastal management plans be prepared, to address climate change impacts and predicted increases in sea level rise, intensity of cyclones and storm surge.
- (5) We have been unable to identify any significant cases from the Northern Territory relating to this issue.

129 <http://www.nt.gov.au/nreta/natres/nht/inrm/index.html>

7.7 Australian Capital Territory

- (1) Planning in the ACT is governed by the *Planning and Development Act 2007* (ACT).
- (2) The ACT's climate strategy, entitled *Weathering the Change, 2007 - 2025*¹³⁰ is made up of a series of action plans, the first of which is *Action Plan 1, 2007 – 2011*. The action plan contains a section on adapting to current and future climate change.
- (3) The initiatives relevant to this issue include undertaking a climate change social impact analysis, preparing an ACT and region vulnerability assessment, assessing the impacts of climate change on the ACT's urban areas, protecting areas of high conservation value and developing an ecosystem connectivity map.
- (4) We have been unable to identify any significant cases from the ACT relating to this issue.

130 http://www.environment.act.gov.au/climate_change/weathering_the_change

8. Case studies of other (international) jurisdictions

8.1 Introduction

Measures to adapt to the coastal effects of climate change across the world are varied. The majority of jurisdictions are in the midst of exploring coastal risks and developing appropriate strategies and regulatory tools. Despite this, some countries have taken more concrete steps to implement coastal adaptation strategies into land use planning and environmental regulation.

8.2 EU

- (1) The European Union (**EU**) recognises the need to adapt for climate change. In 2007, the European Commission published the green paper *Adapting to climate change in Europe – options for EU action*¹³¹, which highlighted coastal impacts and the need to develop strategies. Planning for adaptation is still at an exploratory stage, although the EU has embarked on the development of strategies to manage coastal impacts¹³². In April 2009, the European Commission white paper, *Adapting to climate change: Towards a European framework for action*¹³³ (**White Paper**), recognised the severity of climate change effects on coasts. It committed to developing an integrated coastal planning and management framework to incorporate climate change adaptation strategies. To this end, as a next step European guidelines on adaptation in coastal and marine areas will be developed.
- (2) The accompanying working document *Climate Change and Water, Coasts and Marine Issues*¹³⁴ (**EU Coasts Paper**) argues for adaptation strategies to be incorporated into marine and coastal zone management strategies.¹³⁵ Preliminary views focus on marine strategy, river basin management and flood management.

131 SEC/2007/849, available online at http://eur-lex.europa.eu/LexUriServ/site/en/com/2007/com2007_0354en01.pdf.

132 See further http://ec.europa.eu/environment/climat/adaptation/index_en.htm.

133 SEC/2009/386, available online at

<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52009DC0147:EN:NOT>.

134 Available online at http://ec.europa.eu/environment/climat/adaptation/index_en.htm.

135 EU Coasts Paper, p. 5.

- (3) One aspect of this involves flexible and frequently updated management plans. The EU Coasts Paper advocates the incorporation of coastal climate change adaptation strategies into the EU's *Marine Strategy Framework Directive*¹³⁶ (**Directive**). The Directive requires regional strategies for marine waters, which must be updated every 6 years. The first strategies are due in 2012. These strategies could facilitate adaptation through mechanisms, which can be regularly updated to maintain flexibility with developing information and circumstances. The EU *Water Framework Directive*¹³⁷ provides for the development of river basin management plans, which must be updated every 6 years, with the first plans due in December 2009. The EU Coasts Paper advocates utilising this framework to incorporate climate change adaptation measures.

8.3 Germany

- (1) In late 2008, Germany established the *German Strategy for Adaptation to Climate Change*¹³⁸ (**German Adaptation Strategy**). The German Adaptation Strategy provides a framework for risk assessment followed by development and implementing adaptation measures. In terms of coastal impacts, the German government has committed €380 million to coastal protection measures between 2009 to 2025.
- (2) The German Adaptation Strategy tends towards an emphasis on coastal protection. Regional planning must ensure maximum protection against storm surge and flood risks. Adaptation measures include new dikes and refurbishment, and passive safety precautions¹³⁹.

136 Directive 2008/56/EC, available online at

<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32008L0056:EN:NOT>.

137 Directive 2000/60/EC, available online at http://ec.europa.eu/environment/water/water-framework/index_en.html.

138 Deutsche Anpassungsstrategie an den Klimawandel, available online at

<http://www.bmu.de/klimaschutz/downloads/doc/42783.php> (German) and

<http://www.bmu.de/english/climate/downloads/doc/42841.php> and

http://www.bmu.de/files/english/pdf/application/pdf/das_gesamt_en_bf.pdf (English).

139 German Adaptation Strategy, p. 41. See further General Coastal Protection Plan for Schleswig-Holstein, available online at http://www.schleswig-holstein.de/UmweltLandwirtschaft/DE/WasserMeer/09_KuestenschutzHaefen/02_GeneralplanKuestenschutz/ein__node.html, and the Schleswig-Holstein Integrated Coastal Defence Management plan, available online at

http://www.schleswig-holstein.de/UmweltLandwirtschaft/DE/WasserMeer/09_KuestenschutzHaefen/03_IntegrKuestenzManagementSH/ein__node.html, which recommend, among various measures, a mixture of sea wall defences and utilisation of salt marsh defence systems.

8.4 Netherlands

- (1) The Netherlands has a long history of planning for and protecting against coastal flooding. Dutch planning has recently signified a shift in coastal protection towards developing adaptation strategies which recognise and account for the likelihood of coastal inundation due to climate change. In April 2007, the Dutch government released the *National Programme for Spatial Adaptation to Climate Change*¹⁴⁰ (**National Programme**). The National Programme envisages a three step approach to climate change adaptation in the Netherlands:
 - (a) raising awareness, building networks and strategies;
 - (b) developing and spreading information and a common view; and
 - (c) developing instruments, providing advice on measures and promoting innovation.¹⁴¹
- (2) It is envisioned that this will be carried out by 2014.
- (3) In 2008, the Dutch Delta Commission made 12 recommendations for the short and medium-term. In terms of coastal adaptation, the following recommendations were made:
 - (a) *Flood protection level*: current flood protection levels in areas with dikes must be increased 10-fold by 2050, with new standards adopted by 2013.
 - (b) *Plans for new urban development*: building in low-lying flood prone areas must be based on a cost-benefit analysis.
 - (c) *Areas around dikes*: new development in unprotected areas lying outside the dikes must not impede river discharge capacity and future water levels of lakes. Government will provide information and establish building standards, but residents/users must be responsible for measures to avoid adverse consequences.

140 VROM 7222, available online at <http://www.vrom.nl/pagina.html?id=2706&sp=2&dn=7222>.

141 National Programme, p. iii.

- (d) *North Sea coast*: flood protection will be continued by beach nourishment and possible relocation of tidal channels in order to expand the coast seaward. Sand extraction must be reserved in the short term but should be investigated.
 - (e) *Southwestern delta*: the lifespan of the storm surge barrier must be expanded up to a sea-level rise of 1m, after reliance will be placed on tidal dynamics of the Eastern Scheldt's natural estuarine regime. The Western Scheldt should remain an open tidal system for navigation purposes with flood protection to be maintained through reinforced dikes.¹⁴²
- (4) Many of these recommendations are highly specific to the particular geographical and ecological characteristics of particular regions.

8.5 Venice

- (1) Venice's approach to coastal climate change adaptation in its current form is technologically driven. Two main programs have been proposed to protect the city from rising sea levels, increased flood events and storm surges:
 - (a) Modulo Sperimentale Elettromeccanico (**MOSE project**): the MOSE project revolves primarily around a system of mobile floating gates which, aligned in rows, would provide defences against a 60cm sea level rise. The gates would provide a barrier between the city and the Adriatic. The MOSE project is expected to be completed in 2012, and is estimated to cost in excess of €4 billion.
 - (b) Project Rialto: this project aims to raise Venetian buildings to their original height, with foundations above the water level.

¹⁴² Working together with water: A living land builds for its future, Deltacommissie 2008, available online at <http://www.deltacommissie.com/en/advies>.

- (2) Although neither of these projects has been fully implemented, the preference in Venice for a technological solution no doubt arises from the city's particularly vulnerable position and long history of flooding and subsidence.

8.6 United Kingdom

- (1) In the United Kingdom, the general approach to climate change adaptation in coastal areas is one which recognises the need for managed realignment¹⁴³. This includes recommendations for flood risk assessment in the planning process.
- (2) Currently a consultation process is being undertaken in the United Kingdom to develop new planning policy for coastal change¹⁴⁴. A risk-based approach based upon a hierarchy of principles to appraise, avoid and manage risk and mitigate impacts is proposed. Shoreline management plans are proposed as an integral aspect of the policy reforms, and will identify key local risks and management options. Inappropriate developments should not be permitted in vulnerable areas. It is also proposed that ministerial call-in powers be used to ensure that inappropriate development does not occur.
- (3) Nationally, the floods of 2007 affected almost 7,000 companies and cost £3b in claims.
- (4) In 2003, one summer heat wave cost one local authority nearly £7m in damages to highways with the 2003 April flooding costing another authority £7.5million.
- (5) Adaptation has been part of the international climate change law from the start. Article 4 of the United Nations Framework Convention on Climate Change includes the following:

143 See further 'Making Space for Water', Department of the Environment, Food and Rural Affairs, March 2005, available online at <http://www.defra.gov.uk/environment/flooding/documents/policy/strategy/strategy-response1.pdf>.

144 See further <http://www.communities.gov.uk/archived/publications/planningandbuilding/consultationcoastal>.

All parties ...shall...formulate, implement, publish, and regularly update national, and where appropriate, regional programmes containing measures to mitigate climate change ...and measures to facilitate adequate adaptation on climate change.

- (6) There are various national policies (including National Indicator 188) relating to planning and climate change and development and flood risk which require flood risk assessments.
- (7) Section 181 of the *Planning Act 2008* requires local authorities to:

...include policies designed to secure that the development and use of land in the region contributes the mitigation of, and adaptation to, climate change.
- (8) Section 182 of the *Planning Act 2002*:

Development plan documents must (taken as a whole) include policies designed to secure that the development and use of land in the local planning authority's area contribute to the mitigation of, and adaptation to climate change.
- (9) London has its own Mayor's adaptation strategy and London plan.
- (10) The *UK Climate Change Act 2008* requires planning and compliance policy and regulation to change to include a requirement to assess the impact of planning decisions on the ability to adapt.
- (11) Pursuant to section 61 the Secretary of State may issue guidance on risk assessment, preparing proposals and policies and a requirement to cooperate with other reporting authorities.
- (12) Section 62 of the Act allows the Secretary of State to require an authority to prepare adaptation reports and section 63 requires an authority to comply with any direction made by the Secretary of State under section 62.
- (13) On 21 April 2009, Defra published the draft Flood and Water Management Bill for consultation.

- (14) The Bill proposes that:

The Environment Agency (**EA**) must develop, maintain and apply a strategy for flood and coastal erosion risk management.

The EA may issue guidance on the application of the strategy.

Local lead flood authorities (the relevant unitary authority or county council) will also be required to develop, maintain and apply strategy for flood risk management.

- (15) The Bill is likely to be introduced in Parliament session in 2010.

8.7 New Zealand

- (1) The approach taken in New Zealand to managing the coastal impacts of climate change involves a combination of national policy statements and regionally and locally implemented land use planning tools which give effect to the national strategy.

- (2) National coastal policy

The *New Zealand Coastal Policy Statement 1994*¹⁴⁵ recognises sea level rise and the need to manage for it. 'Policy statements and plans should recognise the possibility of a rise in sea level, and should identify areas which would as a consequence be subject to erosion or inundation. Natural systems which are a natural defence to erosion and/or inundation should be identified and their integrity protected.'¹⁴⁶

- (3) A new coastal policy statement, the *Proposed New Zealand Coastal Policy Statement 2008*¹⁴⁷ is currently under consideration. The proposed new policy statement embraces the precautionary principle and, in terms of climate change, provides that:

145 Available online at <http://www.doc.govt.nz/upload/documents/conservation/marine-and-coastal/coastal-management/nz-coastal-policy-statement.pdf>. See further Department of Conservation, at <http://www.doc.govt.nz/conservation/marine-and-coastal/coastal-management/>.

146 New Zealand Coastal Policy Statement 1994, Policy 3.4.2.

147 Proposed New Zealand Coastal Policy Statement 2008, available online at <http://www.doc.govt.nz/publications/getting-involved/consultations/current/proposed-new-zealand-coastal-policy-statement-2008/>. For the status of the proposed statement, see further <http://www.doc.govt.nz/getting-involved/consultations/closed/new-zealand-coastal-policy-statement-2008/>.

- (a) land reclamation proposals must be considered in light of the effects of climate change over at least a 100 year period. Reclamation must be designed and located to anticipate the effects of climate change;¹⁴⁸
 - (b) financial development contributions should be considered for acquisition of land that would provide a buffer against the adverse effects of climate change on the coastal environment;¹⁴⁹
 - (c) policy statements and plans shall identify coastal environments potentially affected by coastal hazards, including the effects of climate change, with regard to short-term natural dynamic fluctuations of erosion and accretion; long-term trends of erosion or accretion; slope stability or other geotechnical issues; the potential for natural coastal features and areas of coastal hazard to migrate as a result of dynamic coastal processes including sea level rise, storm frequency, intensity and surges; and coastal sediment dynamics;¹⁵⁰ and
 - (d) hard protection structures for use against coastal hazard risks should be considered by local authorities in light of the expected effects of climate change over at least a 100-year period.¹⁵¹
- (4) Council plans and guidance manuals

Under the *Resources Management Act 1991 (RMA)*, regional councils must prepare regional coastal plans which implement New Zealand's national coastal policy¹⁵². The RMA provides that in exercising functions and powers under the RMA, 'particular regard shall be had to climate change effects'¹⁵³. Under the RMA, regional councils have a duty to manage 'natural hazards'¹⁵⁴. This includes sea-level rise¹⁵⁵.

148 Proposed New Zealand Coastal Policy Statement 2008, Policy 27.

149 Proposed New Zealand Coastal Policy Statement 2008, Policy 29.

150 Proposed New Zealand Coastal Policy Statement 2008, Policy 51.

151 Proposed New Zealand Coastal Policy Statement 2008, Policy 54.

152 RMA, sections 67 and 75.

153 RMA, section 7.

154 RMA sections 30, 31 and 35.

155 RMA, section 2.

- (5) New Zealand's Ministry for Environment has prepared a number of guidance manuals to assist local governments in managing the effects of coastal climate change in land use planning:
- (a) Preparing for coastal change: A guide for local government in New Zealand (**'Preparing for coastal change'**);¹⁵⁶
 - (b) Coastal Hazards and Climate Change – A Guidance Manual for Local Government in New Zealand (2nd ed, July 2008) (**'Coastal Hazards and Climate Change'**);¹⁵⁷ and
 - (c) Climate Change Effects and Impacts Assessment: A Guidance Manual for Local Government in New Zealand (2nd ed May 2008)¹⁵⁸ (**'Climate Change Effects and Impacts Assessment'**).
- (6) 'Coastal Hazards and Climate Change' and 'Climate Change Effects and Impacts Assessment' are technical reports which establish a risk management framework in which the consequences of coastal hazards arising from climate change may be considered.
- (7) 'Coastal Hazards and Climate Change' takes the view that '[p]lanned adaptation is part of a balanced and prudent response to climate change.¹⁵⁹ Accordingly, 9 adaptation principles are identified as aiding in successful adaptation. These include:
- (a) work in partnership with coastal communities;
 - (b) understand existing risks and vulnerabilities to coastal hazards and climate change and their critical thresholds;
 - (c) identify the most adverse coastal hazards and compounding climate change risks and focus on actions to manage the most vulnerable areas;

156 Available online at <http://www.mfe.govt.nz/issues/climate/resources/local-govt/index.html>.

157 Available online at <http://www.mfe.govt.nz/issues/climate/resources/local-govt/index.html>.

158 Available online at <http://www.mfe.govt.nz/issues/climate/resources/local-govt/index.html>.

159 Coastal Hazards and Climate Change, section 4.2.

- (d) seek opportunities to incorporate adaptation into all new and existing developments within the coastal margin;
 - (e) incorporate flexibility (ie, adaptive management) to deal with changing risks and uncertainties. Recognise the value of a phased approach to adaptation;
 - (f) recognise the value of no-regrets, low-regrets and win–win adaptation options to managing climate change risks;¹⁶⁰
 - (g) adopt a sequential and risk-based approach to decision-making regarding coastal development;
 - (h) avoid actions that will make it more difficult to cope with coastal hazard and climate risks in the future; and
 - (i) review the effectiveness of adaptation measures and planning processes through continual monitoring and evaluation¹⁶¹.
- (8) Coastal hazard risk management should be guided by several basic principles:
- (a) In undeveloped coastal areas, identify and understand coastal hazard risks, then plan to avoid new developments in coastal hazard areas; and
 - (b) In partly developed coastal areas and developed coastal areas, in addition to the above items, plan to sustainably reduce coastal hazard risks in areas already developed or subdivided using a risk-based approach, and plan for evacuation.¹⁶²

160 Coastal Hazards and Climate Change further provides at section 4.2 that ‘no-regrets: policies and decisions that will pay off immediately under current climate conditions; low-regrets: low-cost policies, decisions and measures that have potentially large benefits; win–wins: policies, decisions and measures that help manage several coastal hazard or climate related risks at once, or bring other environmental and social benefits, eg, preservation of natural character.’

161 Coastal Hazards and Climate Change, section 4.2.

162 Coastal Hazards and Climate Change, section 6.2.

- (9) 'Coastal Hazards and Climate Change' recommends that for greenfield sites, new development should be located landward of defined coastal hazard zones. Planning provisions should implement appropriate controls to give effect to this¹⁶³.
- (10) In areas of existing development, 6 categories of planning mechanisms are identified:¹⁶⁴
- (a) *information and education*: non-statutory approaches involving educational materials, websites, public talks and meetings, effective use of media and technical reports. Statutory approaches include incorporating hazard and risk information into planning schemes and planning documents, including coastal hazard information in property certificates and reports (land information memorandum) for potential purchasers; and placing notices of coastal hazard risk on property titles under the relevant building legislation;¹⁶⁵
- (b) *land use planning regulation*: a number of principles are discussed, including:
- (i) embracing a risk-based assessment,
- (ii) planned or managed retreat from coastal areas under threat of inundation or erosion, including micro-retreat (such as elevating a building), relocation within a property boundary, relocation to another site, and large scale relocation of settlements and infrastructure. Methods recommended for implementing managed retreat include planning provisions regarding existing use rights and limiting or controlling the construction of protection works. This may include limiting reconstruction and replacement

163 Coastal Hazards and Climate Change, section 6.3.

164 See Coastal Hazards and Climate Change, section 6.

165 Coastal Hazards and Climate Change, section 6.4.

works,¹⁶⁶ requiring buffer reserves. Coastal protection works are generally discouraged for a number of reasons.

- (iii) property title covenants to prevent undesirable activities such as construction of coastal defences, and which identify where and when retreat/relocations is required; and
 - (iv) relocation of infrastructure out of hazard areas;
- (c) *building consent controls*: The *Building Act 2004* provides that building consents must be refused where the land is subject to one or more natural hazards, or the building work is likely to accelerate, worsen or result in a natural hazard on that land or any other property unless adequate provision is made to protect the land or restore the damage.¹⁶⁷ Building consents must be issued on land at risk from coastal hazards as long as the building complies with the Building Code and it does not accelerate, worsen or extend the hazard to another property.¹⁶⁸
- (d) *financial mechanisms*: for managed retreat, this may include financial instruments such as purchasing properties, subsidies, taxes on activities of elevated coastal hazard risk or adverse effects, pre-paid community relocation funds, transferable development rights, and/or insurance incentives or disincentives.
- (e) long-term financial infrastructure; and
- (f) protection structures.
- (11) 'Preparing for Climate Change' provides a checklist of relevant climate change matters for councils to take into account in creating plans. Although more relevant to the New Zealand statutory context, the checklists aim to ensure that plans consistently apply climate change

166 Coastal Hazards and Climate Change, section 6.5.3, and the Canterbury Regional Coastal Environment Plan, available online at <http://www.ecan.govt.nz/publications/Pages/regional-coastal-environment-plan.aspx>.
167 Building Act 2004, section 71.

168 Building Act 2004, section 72; Coastal Hazards and Climate Change, section 6.6.

policy and identify and impose appropriate controls for the relevant hazards which may be relevant in the Victorian context.¹⁶⁹

(12) **Local examples**

These policy directions have begun to be implemented in planning provisions in New Zealand. For example, the *Dunedin City District Plan*¹⁷⁰ provides that it is policy to '[c]ontrol development in those areas identified as being likely to be affected by a rise in sea level.'¹⁷¹ To implement this policy, the Dunedin City District Plan provides that:

- (a) land information memoranda and project information memoranda (land information certificates) should be used to identify whether a proposed activity or structure would be in a hazard prone area;¹⁷²
- (b) site investigations and assessments should be carried out by suitably qualified persons where a proposed activity requires a subdivision consent, building consent, earthworks permit or other resource consents for a hazard prone site;¹⁷³
- (c) agencies and landowners must collaborate to collect and share information on hazards and developing sustainable land use practices;
- (d) agencies responsible for industrial and building codes should liaise on the development of codes of practice that avoid, remedy or mitigate hazards, and work to improve the communities awareness, and encourage implementation of the codes;¹⁷⁴ and
- (e) the implementation of works should be considered where necessary to avoid, remedy or mitigate the potential adverse effects of natural hazards.¹⁷⁵

169 Preparing for Climate Change, Appendix 5 'Climate Change in Plans – Checklist for Contents'.

170 Available online at <http://www.dunedin.govt.nz/your-council/policies/district-plan>.

171 Dunedin City District Plan, Policy 17.3.5.

172 Dunedin City District Plan, Method 17.4.3.

173 Dunedin City District Plan, Method 17.4.4.

174 Dunedin City District Plan, Method 17.4.5.

175 Dunedin City District Plan, Method 17.4.9.

- (13) The *Auckland Regional Plan: Coastal*¹⁷⁶ (**Auckland Coastal Plan**) incorporates climate change adaptation strategies in a number of ways. Applications for coastal protection structures must demonstrate that, among other considerations relating to coastal hazards (which includes sea level rise) the expected effects of sea level rise have been taken into account.¹⁷⁷ Sea level rise is specifically identified as one of the dynamic coastal processes which must be taken into account in determining the appropriate design and location for structures. The best available long-term estimate of sea level rise shall be used in this assessment.¹⁷⁸
- (14) Under the Auckland Coastal Plan, it is policy to avoid new subdivisions in areas prone to the effects of sea level rise and climate change. New subdivisions should be located and designed to avoid interference with natural coastal features that have a tendency to migrate inland as a result of climate and sea-level changes. One of the aims of this is to avoid the need for coastal protection measures.¹⁷⁹ Further subdivision, use or development in existing developed areas prone to sea level rises should be avoided.¹⁸⁰ The best available estimate of mean sea level rise for a locality should be used in assessing the effect that a rise in mean sea level may have on subdivision, use, development and protection of the coastal environment.¹⁸¹
- (15) Information sharing is also adopted policy in the Auckland Coastal Plan. The Auckland Regional Council will, in consultation with territorial authorities, develop a regional methodology for the identification of areas which could be subject to erosion or inundation as a result of mean sea level rise, maintain a database of identified areas, undertake research on the risks and impacts, and methods to avoid, remedy or mitigate hazards.¹⁸² Information on the best available estimate for mean sea level rise should be maintained and made publicly available.¹⁸³

176 Available online at http://www.arc.govt.nz/environment/coastal-and-marine/coastal-plan/managing-the-coast_home.cfm.

177 Auckland Coastal Plan, Policy 12.4.10.

178 Auckland Coastal Plan, Policy 12.4.12.

179 Auckland Coastal Plan, Policy 21.4.1.

180 Auckland Coastal Plan, Policy 21.4.2.

181 Auckland Coastal Plan, Policy 21.4.8.

182 Auckland Coastal Plan, Policy 21.6.1.

183 Auckland Coastal Plan, Policy 21.6.6.

8.8 United States of America

(1) California

- (a) The *2009 California Climate Adaptation Strategy*¹⁸⁴ (**California Adaptation Strategy**) recognises the significant implications of climate change for its coastal areas. However, as with similar endeavours in other jurisdictions, the California Adaptation Strategy signifies the beginning of an integrated process to develop effective regulatory mechanisms to respond to the coastal impacts of climate change.
- (b) Coastal impacts feature amongst its key recommendations. Project alternatives that avoid significant new development in at risk areas should be considered. Government agencies should generally not develop new significant structures in areas that will require significant protection from sea level rise, storm surges or coastal erosion. Vulnerable shoreline areas with existing developments of economic, cultural or social value may have to be protected.¹⁸⁵
- (c) One of the key recommendations of the California Adaptation Strategy is the need to develop a state-wide climate impact vulnerability assessment. This would integrate risk with the likely sensitivity and response capacity of both natural and human systems. The assessment involves three primary steps:
 - (i) further research into the probable risks, scenarios and consequences;
 - (ii) policy makers collaborating with climate scientists to identify adaptation policy options, costs and benefits in order to best manage the identified risks; and

¹⁸⁴ December 2009, available online at www.climatechange.ca.gov.

¹⁸⁵ California Adaptation Strategy, p. 7.

- (iii) a broad public stakeholder process to communicate the options available and to prioritise California's goals.¹⁸⁶
- (d) In terms of land use planning for coastal impacts, the California Adaptation Strategy provides the following 6 strategies:
 - (i) Strategy 1: Establish state policy to avoid future hazards and protect critical habitat;
 - (ii) Strategy 2: Provide state-wide guidance for protecting existing critical ecosystems, existing coastal development and future investments;
 - (iii) Strategy 3: State agencies should prepare sea-level rise and climate adaptation plans;
 - (iv) Strategy 4: Support regional and local planning for addressing sea-level rise impacts;
 - (v) Strategy 5: Complete a state-wide sea-level rise vulnerability assessment every 5 years;
 - (vi) Strategy 6: Support essential data collection and information sharing.¹⁸⁷

These coastal strategies are considered relevant in the Victorian context and should be referred to in greater depth.

- (e) In particular, it is recommended strategy (in the California Strategy) that:
 - (i) state agencies should avoid establishing or permitting new development in future hazard zones in most cases if new protective structures would be necessary (strategy 1a);

¹⁸⁶ California Adaptation Strategy, p. 29.

¹⁸⁷ California Adaptation Strategy, pp. 73-78.

- (ii) innovative approaches should be promoted to redesigning coastal structures that are resilient to the impacts of climate changed and can protect existing developments in low-lying areas (strategy 1b);
 - (iii) state-wide guidance and regional planning forms should be created to help local governments update local plans and make planning decisions in light of sea-level rise (strategies 2a and 4c);
 - (iv) programmes should be developed to encourage property owners in high risk areas to relocate or limit future development;
 - (v) new development should be clustered in areas of low vulnerability to sea-level rise;
 - (vi) additional buffers and setbacks for new construction should be considered to minimise risks to people and property, as well as to protect coastal resources (natural habitats and recreational areas);
 - (vii) the state should identify priority conservation areas and recommend land for acquisition and preservation, particularly vulnerable shoreline areas containing critical habitat;
 - (viii) future sea level estimates should be taken into consideration when undertaking restoration efforts and natural shoreline enhancements (e.g., grading levels for wetland restorations) should be designed to promote sedimentation and protect against shoreline erosion (e.g., native oysters and eelgrass).¹⁸⁸
- (f) Given that the California Adaptation Strategy will be developed and implemented along a similar timeline to that which might be

188 California Adaptation Strategy, pp. 72-73.

expected in Victoria, continued investigation of the experience in California is recommended.

(2) **Texas**

- (a) In Texas, a unique legal instrument called a 'rolling easement' has been developed to deal with the dynamic coastal processes along the Gulf of Mexico which result in the frequent realignment of the coast on barrier islands due to storms and hurricanes. Although not a result of climate change, it is considered that rolling easements are relevant to coastal impacts of climate change. Under the *Open Beaches Act*,¹⁸⁹ a 'rolling easement' applies to the Gulf of Mexico shorefront. Where a storm shifts the vegetation line of the shorefront inland with the result that a previously landward building is located on the seaward side of the vegetation line, then the rolling easement requires the landowner to relocate the building to the landward side.¹⁹⁰ Encroachments such as bulkheads and seawalls are prohibited,¹⁹¹ thus ensuring that the natural coastal processes are not be impeded.
- (b) Rolling easements have resulted in the development of shorefront properties in Texas' barrier islands primarily built on pilings or stilts in order to be easily moved when the coastline shifts. It has been argued that one benefit of the rolling easement, compared to mandated setbacks, is that it does not deprive a landowner of all economic use of one's property. Another benefit is that it obviates the complicated decision of where to delineate a setback.¹⁹²

189 Tex. Nat. Res. Code Ann, chapter 61.

190 Tex. Nat. Res. Code Ann, chapter 61 et seq., and sections 61.013, 61.015, 61.0183.

191 Tex. Nat. Res. Code Ann, s 61.03.

192 Levina, Jacob, Ramos, Ortiz, Policy Frameworks for Adaptation to Climate Change in Coastal Zones: The Case of the Gulf of Mexico (OECD, COM/ENV/EPOC/IEA.SLT(2007)2), May 2007, p. 33. For further information on American approaches to sea level rise and erosion control easements, see further National Oceanic and Atmospheric Administration, Ocean and Coastal Resource Management, Erosion Control Easements, available online at http://coastalmanagement.noaa.gov/initiatives/shoreline_ppr_easements.html; Titus, James (1998), Rising Seas, Coastal Erosion, and the Takings Clause: How to Save Wetlands and Beaches Without Hurting Property Owners, Maryland Law Review, 57:1279-1399, available online at <http://www.epa.gov/climatechange/effects/downloads/takings.pdf>.

8.9 Canada

(1) New Brunswick

- (a) The Canadian Maritime province of New Brunswick's coastal climate change policy, *A Coastal Areas Protection Policy for New Brunswick*¹⁹³ (**New Brunswick Policy**), establishes objectives and coastal zones. The New Brunswick Policy endorses the following objectives which are relevant to climate change:
- (i) to reduce the likelihood of threats to personal safety by storm surges and to minimize the danger to personnel involved in emergency and rescue efforts during storm and/or flooding events;
 - (ii) to maintain the buffering capacity of coastal areas to protect inland areas from storm surges;
 - (iii) to maintain flora and fauna, both for the role they play in traditional fisheries and eco-tourism, as well for their inherent value in maintaining the coastal eco-system; and
 - (iv) to minimize public expenditures required to repair storm damage to public property such as roads, bridges, public buildings and so on, as well as to reduce the expenditures required to control erosion as a means of protecting human-made structures.¹⁹⁴
- (b) Three coastal zones exist under the New Brunswick Policy:
- (i) Zone A - the areas closest to the water known as the coastal lands core area;
 - (ii) Zone B - the areas beyond Zone A which provide a further buffer, and

193 Available online at <http://www.gnb.ca/0009/0371/0002/coastal-e.pdf>.

194 New Brunswick Policy, p. 6.

- (iii) Zone C - the areas beyond Zone B that form a transition from coastal to inland areas.
- (c) Zone A encompasses the most sensitive zone (beaches, dunes, marshes, etc.). In Zone A, the following are acceptable activities:
- (i) the maintenance or enhancement of the coastal feature, e.g. sand fencing or planting native dune grasses to protect sand dunes;
 - (ii) acceptable erosion control structures;
 - (iii) development associated with access and interpretation for educational or research purposes;
 - (iv) a development or undertaking to protect a coastal feature while providing approved public or private access to a shoreline, e.g. a boardwalk;
 - (v) on coastal marshes that have been historically diked for agricultural purposes:
 - (A) carrying out agricultural practices;
 - (B) constructing agricultural storage buildings for activities related to the use of that land, e.g. hay storage (provided no hazardous materials are stored);
 - (C) allowing diked marshlands to naturally revert to salt water marshes by removing controls; and
 - (D) structures and subject to review the conversion of diked marshlands to freshwater marshes.¹⁹⁵
- (d) Zone B comprises a 30 metre buffer inland of Zone A. A broader range of activities would be permitted in Zone B:
- (i) all of the activities acceptable in a Zone A are acceptable in a Zone B;

195 New Brunswick Policy, p. 9.

- (ii) the construction of a new single family residence if it meets conditions related to:
 - (A) existing residences on either side of lot,
 - (B) proximity to the boundary of Zone A,
 - (C) size of structure, and
 - (D) ability to meet other regulatory requirements, e.g. septic system, and elevation as noted above.
- (iii) subject to a review, the repair, expansion or replacement of existing structures subject to the following conditions:
 - (A) the activity be no closer to Zone A than the existing building,
 - (B) the total increase in size of the building does not exceed 40% of the existing building, and
 - (C) in the case of new or rebuilt structures, the habitable portion of the structure is at least 2 metres above the Higher High Water Large Tide elevation.¹⁹⁶
- (e) Zone C is landward of Zone B, and comprises a coastal transition area in which the effects of coastal climate change processes will vary greatly. The broadest range of activities in the coastal zones would be allowed in Zone C. Permitted activities would be determined according to criteria rather than prescribed activities. These criteria include the susceptibility of the area to storm surges, and the biophysical impact on the coastal ecosystem of the development.¹⁹⁷

¹⁹⁶ New Brunswick Policy, p. 10.
¹⁹⁷ New Brunswick Policy, p. 11.

8.10 Europe

EU – Adapting to climate change: towards a European framework for action (April 2009)

- (1) This white paper argues the economic case for a strategic approach to adaptation. It seeks to isolate incidents of 'mal-adaptation' especially in the areas of sea level rise or flood protection infrastructure.
- (2) It makes the argument for a more coherent and integrated approach to coastal planning and management. It promotes the Integrated Maritime Policy which will provide a comprehensive framework to integrate adaptation efforts and calls for steps to ensure that the provisions in the Integrated Coastal Zone Management Recommendations are fully respected and strengthened.

8.11 South Africa - The City of Capetown

- (1) The City of Cape Town (**City**) has been involved in adaptation work for a number of years particularly in relation to sea level rise adaptation.
- (2) The City is particularly exposed given that it has approximately 307kms of coastline which is also its single greatest economic and social asset.
- (3) The City's first step was to acknowledge a need to identify vulnerable communities and locations. Once vulnerable locations and communities are identified it is incumbent on the local authorities to communicate the extent of sea level rise risk to local residents.
- (4) The City has produced Coastal Development Guidelines. South Africa also has an Integrated Coastal Management Bill which proposes a clearly demarcated coastal buffer zone and national coastal management protocol and is consistent with South Africa's international commitment to integrated coastal zone management under the United Nations Agenda 21. The Bill specifically calls for the building of institutional and legal capacity to manage the coastal area.

- (5) In October 2003 the City formally adopted a coastal zone management strategy.
- (6) It has undertaken a sea level rise risk assessment and provided guidance to future coastal development (City's Coastal Development Guidelines) to identify higher risk areas that are prone to high impact.
- (7) The City has adopted a multi-focused plan to relocate infrastructure and services away from vulnerable areas, strengthening and protecting infrastructure where needed and recommends the integration of adaptation measures into disaster relief measures.
- (8) The City acknowledges a growing awareness that it is both complex and difficult to predict impacts and to 'climate proof' a city. It prefers the view that regards climate adaptation as an ongoing process that creates the scope to deal with a wide range of inherently difficult to protect climate contingencies.
- (9) It adopts the language of the United Kingdom Climate Impacts Programme (**UKCIP**) being that the 'the aim is not to be well adapted, but adapting well'.
- (10) The City views adaptation as a social institution learning process, a series of decisions that evaluates risks, identifies options, chooses an option, monitors the outcome and then reiterates the process at the next decision node. This approach reflects the IPCC's fourth assessment report 2007 and allows decision maker to deal with higher levels of uncertainty.
- (11) The City argues that this is a more appropriate approach than one just based on cost benefit analysis.
- (12) Sea level adaptation is best managed in accordance with the principles of integrated coastal zone management which seeks to balance, over time, the environmental, economic, social, cultural and recreational objectives of the coastal zone within the limit set by natural dynamics.

- (13) Present City expenditure on coastal defences will not be sufficient to keep pace with increases in coastal erosion and flooding. The infrastructure approach used to prevent the sea from advancing in the past has proven to be costly to maintain and sometimes ineffective.
- (14) For example, the Thames Barrage was constructed at huge expense in order to protect the City of London against the threat of storm surge and the impact of high river tides.
- (15) **Combined options reduce the most risk**

Very few single interventions are able to address all of the risks generated by sea level rise. Combinations of responses tend to be more effective.

(16) **Applying a coastal buffer zone**

- (a) In the context of sea level rise risk coastal setback zones are good planning. The Coastal Development Guidelines include a 'blue line' being a 5m contour, adjusted in line with the existing coastal developments, below which new developments should be prevented. The line is a socio institutional risk management tool and should be seen as dynamic and flexible in the long term. When new information on the impacts of sea level rise shows that specific locations are more exposed than originally thought, the blue line will be adjusted accordingly.
- (b) In some instances implementation of legislation and enforcement of a coastal buffer will necessitate a managed threat from impact theories in order to manage risks.
- (c) The sea level rise options are classified into two broad categories.
 - (i) Nil regrets options
 - (ii) Additional options involving some form of trade off or cost
- (d) Nil regrets options

These include:

- (i) Do not reclaim further land.
 - (ii) Do not further degrade wetlands.
 - (iii) Maintain drains and stormwater systems.
 - (iv) Integrate sea level rise scenarios into future planning decisions.
 - (v) Incorporate sea level rise risks in disaster management strategies.
 - (vi) Decentralise strategic infrastructure.
- (e) Additional options involving some form of trade off or cost
- (i) Stabilisation planting.
 - (ii) Proactive wetland rehabilitation.
 - (iii) Kelp bed protection and ensuring kelp remains on exposed beaches at key times.

(17) Additional actions

- (a) Physical options
- (i) Sea walls - there is currently little option in the City but to try and maintain the wall protecting the City. In 2008, the City issued a contract worth R12.5million for the maintenance of the wall.
 - (ii) Groynes which are wooden or concrete or rock barriers of walls perpendicular to the sea.
 - (iii) Barrage and barriers such as the Thames Barrage.
 - (iv) Raising infrastructure - although it is difficult to know exactly how high the infrastructure needs to be in order to

be considered safe. It may be difficult to raise many of the roads due to the need to maintain clearance for freight trucks under certain bridges for example.

- (v) Offshore reef nourishment.
- (b) The physical sea defences described under additional actions are no longer considered best practice in order to practically manage sea level rise given their propensity to result in unforeseen and adverse consequences, the relatively high cost and the fact that they do not provide absolute guarantees against inundation and storm surges (mal-adaptation).

9. Insurance and liability issues

9.1 Climate Change and Insurance Risks

- (1) Local governments in their roles as planners, public authorities and asset managers have a responsibility to consider the impacts of climate change. A failure to consider the risks of climate change may lead to all manner of legal risks unless there is statutory intervention limiting liability, as is the case with the *Road Management Act 2004* in Victoria.
- (2) In the absence of legislative protection from liability, it is critical that local government is aware of climate change issues and responds effectively in a manner which mitigates and where possible avoids these legal risks.

9.2 How will climate change impact on local government?

- (1) The key area where climate change will impact on local government is in the field of planning and environmental law, particularly in the context of coastal development and development approvals more generally.
- (2) In Australia, the impact of climate change is most likely to relate to rising sea levels including erosion and flooding and extreme weather events. The impacts are mostly likely to be felt in coastal regions, given the high level of Australians living in coastal areas (over 80% of Australians live within 50km of the coastline).
- (3) Climate change will have many practical effects on local governments. For instance in Victoria, the VCS recommends that planning policy should factor in a sea level rise of not less than 80cm by 2100 and climate change considerations should be incorporated into coastal planning and management decision-making.

9.3 Considering Climate Change in Decision-Making Processes

- (1) There is currently a great deal of uncertainty as to the extent to which local government must consider climate change impacts. However there is a clear trend that increasingly local government must consider climate change impacts in decision-making, particularly when granting approvals for major projects.
- (2) For example, the case of *Gray v the Minister for Planning*¹⁹⁸ concerned development approvals for a proposed new coal mine. The NSW Land and Environment Court declared the environmental assessment of the project to be void because it failed to take into account the development's greenhouse gas impacts. Other recent cases such as *Australian Conservation Foundation v Minister for Planning*¹⁹⁹ and *Queensland Conservation Council Inc v Xstrata Coal Queensland Pty Ltd*²⁰⁰ have also considered the extent to which the generation of green house gas emissions should be taken into consideration.
- (3) In Victoria, VCAT recently affirmed a Council's decision based on climate change considerations (*Hain v Glen Eira City Council*²⁰¹). In this case the Council refused a permit to remove a drainage and sewerage easement. Although the easement had not been used for 83 years, Council considered that the easement should remain given the lack of public drainage in the area and the likely increase in heavy rainfall events as a result of climate change.

198 [2006] NSWLEC 720.

199 *Australian Conservation Foundation v Minister for Planning* [2004] VCAT 2029

200 *Queensland Conservation Council Inc v Xstrata Coal Queensland Pty Ltd* [2007] QCA 338 (McMurdo P, Homes JA, Mackenzie J)

201 [2006] VCAT 2493

9.4 **Climate change: Liability and Insurance Issues**

- (1) In Australia, insurance has historically played a key role in managing the risks of weather related damage. However, the rapid and unpredictable nature of climate change certainly poses challenges for insurers, as a less predictable climate makes it much more difficult to assess risk.
- (2) The rapidly evolving and wide-ranging impacts of climate change have also meant that there are natural events for which no insurance coverage currently exists, such as sea level rises. There is also no coverage available to protect against decreases in land values for coastal properties. The land value of a coastal property often far exceeds the value of any attached dwelling. However, while the dwelling is often insured, the land value is not.
- (3) Furthermore, many 'extreme weather' events are excluded from insurance policies, such as storm surges, landslips and sea level rises. Given that the frequency of extreme weather events is likely to increase, this gives rise to serious policy considerations in the near future.
- (4) The coming years are likely to see significant policy developments in this regard. We note that a recent Commonwealth Government report entitled *Managing our Coastal Zone in a Changing Climate (October 2009)* recommended that the Productivity Commission undertake an inquiry into the projected impacts of climate change and related insurance matters.
- (5) The gaps in insurance coverage may mean that property owners will more readily seek to recover from Councils and statutory authorities (particularly if the risks are uninsurable).

9.5 Potential Legal Liability for local Councils

- (1) It is difficult to conceive of every situation in which a public body might face legal liability in relation to coastal climate change related matters.
- (2) Given the rapid developments in this area of law, it is impossible to predict the extent and scope of future legal liability for the effects of climate change. However the most likely causes of action against local government will be nuisance and negligence.

9.6 Nuisance

A cause of action for nuisance may arise in circumstances where there is an unlawful interference with a person's land. To establish nuisance it is necessary that there is material damage or injury and that the risk was foreseeable. The risk of extreme weather events will become more foreseeable as the effects of climate change begin to manifest themselves more frequently.

- (1) Landowners affected by coastal inundation may be able to seek recourse from polluting entities under the tort of nuisance. This tort comprises the separate actions of private nuisance and public nuisance, both of which are well suited to addressing climate change issues²⁰².

Private Nuisance

- (2) An action in private nuisance may be brought by a person who holds a proprietary interest in land where there has been a substantial and unreasonable interference with their use and enjoyment of land.
- (3) Owners of coastal properties affected by sea-level rise could seek to bring an action against greenhouse gas emitting entities. In doing so, they would need to establish that the defendant contributed to sea level-rise, this constituted an unreasonable interference with the plaintiff's property rights and actual damage has been caused as a result.

202 Smith & Shearman (2006), "Climate Change Litigation: Analysing the law, scientific evidence & impacts on the environment, health and property", Presidian Legal Publications, Adelaide, pg.80.

- (4) What constitutes a “substantial interference” is a question of fact having regard to the character and location of the land, the duration and time of the interference and the effect of the interference.
- (5) An action in private nuisance will not succeed if the public interest outweighs the inconvenience or injury suffered by an individual. This relates to the “unreasonableness” requirement. On this basis, a defendant may argue that their manufacturing, energy production or other activities which have contributed to climate change are so necessary and important that they outweigh the interference caused to private property rights.
- (6) A plaintiff must also be able to demonstrate how climate change has impacted on their land in particular. The damage caused must be more than general climate change impacts. Where an action is being brought by a number of affected landowners, it may be sufficient to establish that specific regional climate change impacts have occurred²⁰³.
- (7) Another substantial hurdle that a plaintiff must overcome is to establish causation. This may be difficult to establish as it would require them to prove that one or more specific defendants contributed to sea level-rise to such an extent that they should be held liable for damages.

Public Nuisance

- (8) The facts that give rise to an action in private nuisance may also give rise to an action in public nuisance which arises when a person unreasonably endangers the health, property or comfort of the public generally or obstructs the public in the exercise of its rights²⁰⁴.
- (9) Public nuisance is easier to establish than private nuisance in a number of ways. It can be brought by a broader category of plaintiffs, does not require a connection with a legal interest in land and only requires that general, rather than regional or specific, climate change impacts must be established.

203 Ibid.
204 Ibid, pg.81.

(10) Actions in public nuisance are generally brought by the Attorney-General on behalf of the community. They can also be brought by a private individual if they are able to establish that they have suffered special injury over and above the ordinary inconvenience suffered by the community at large²⁰⁵. Special damage includes loss of property and diminution in the value of property²⁰⁶ such as might be experienced as a result of climate change impacts.

(11) **Freehold land - Implications of climate change**

This area of law has significant potential for landowners affected by sea-level rises to recover damages for property loss. The hurdle for potential plaintiffs will be to overcome the difficulty of establishing causation and unreasonableness but if this can be achieved, then the potential liability for damages would be substantial.

9.7 Negligence

(1) To establish a negligence action, a claimant must establish that a duty of care was owed to them (say, by a Council), that the Council breached that duty of care and that the breach caused loss and damage. In such cases claimants will also be required to show that the relevant Council knew or ought to have known of the risk of harm. This element will no doubt become increasingly easier to establish given that there is now growing international scientific and political acceptance of the impacts of climate change and their risks to communities.

(2) Public bodies are not liable in common law for merely failing to exercise statutory powers or duties. Something additional is required to extend the operation of the common law to the public body. There is no doubt that Councils are required to have regard to and consider the possible impacts of climate change, but if they fail to do so what are the consequences? The real question is to what extent is a Council can be

205 See Brett J in *Benjamin Storr* (1874) LR 9 CP 400, there must be “an unreasonable interference with a right common to the general public”.

206 Halsbury’s Laws of Australia (2009), Chapter 415 – Tort, 415(3) “Nuisance”, LexisNexis Australia.

held liable in common law for the failure to exercise statutory powers in relation to climate change matters conferred upon them by legislation.

- (3) There are a number of High Court cases which examine the circumstances in which a statutory authority will be said to owe a common law duty to act. In this field there has been a doctrinal evolution over a number of years to the point where it is now very difficult to discern a clear statement of principle from the various decisions of the High Court. The cases in which these issues have been most recently considered include *Sutherland Shire v. Heyman* (1985) 157 CLR 424, *San Sebastian v. Minister* (1986) 162 CLR 340, *Pyrennees v. Day* (1998) 192 CLR 330, *Brodie v. Singleton* (2001) 206 CLR 512, *Great Lakes, Stuart v. Kirkland Veenstra* [2009] HCA 15. It is beyond the scope of this briefing report to attempt to articulate a clear statement of principle emanating from the High Court as to the circumstances in which a Council will owe a common law duty to exercise its statutory powers.
- (4) Leaving to one side the complex question of whether or not a duty to act exists, a further potentially significant impediment to any plaintiff is proof of causation.
- (5) Further difficulties include the fact that there are statutory defences available for public bodies which can be raised by Councils that have been accused of a breach of their statutory duties. For instance a Council can argue that it has acted 'reasonably'. In Victoria, section 84(2) of the *Wrongs Act 1958* (Vic) provides that an act or omission by a public authority will not constitute a breach of a statutory duty unless the circumstances are 'so unreasonable that no public authority having the functions of the authority in question could properly consider the act or omission to be a reasonable exercise of its functions.' Additionally, section 83 of the *Wrongs Act* provides that a court should consider a Council's financial capacity when assessing whether there has been a breach of duty. To this extent, Councils should ensure that they are reasonably balancing costs and risks in investment decisions and approvals.

10. Property law issues – Crown Land

10.1 Introduction

- (1) This chapter relates to Crown land only. In particular, it addresses:
 - (a) Native title
 - (b) The Crown-freehold boundary
 - (c) Property interests on Crown land

10.2 Native title

- (1) Native title may exist on any Crown land, whether above high water mark (**HWM**) or submerged – subject to the possibility of extinguishment. Native title does not exist over validly-granted freehold land.
- (2) Several cases (notably *Yarmirr*²⁰⁷) confirm that traditional owners may have native title of the sea and sea-bed – at least for internal waters within States, and the inter-tidal zone. In *Yarmirr*, the court held that native title was non-exclusive, and coexisted with the public right to fish and the rights of navigation and innocent passage.
- (3) Although it is possible for native title to exist off-shore, specific cases may conclude that it does not exist in particular areas. In the West Australian *Noongar* case²⁰⁸, Wilcox J of the Federal Court held that native title existed on-shore, but did not exist offshore.
- (4) In Victoria, there are unresolved native title claims over the Gippsland lakes and the seabed adjacent to the 90-mile beach²⁰⁹.

207 *Commonwealth v Yarmirr* [2001] HCA 56; 184 AJR 113; 208 CLR 1; 75 ALJR 1582 (11 October 2001)

208 *Bennell v Western Australia* [2006] FCA 1243 (19 September 2006)

209 http://www.nntt.gov.au/Publications-And-Research/Maps-and-Spatial-Reports/Documents/Quarterly%20Maps/Sea_RNTC_map.jpg

10.3 Native title - Commentary – Implications of Climate Change

- (1) Native title derives from continuous association with the land, and continuity of traditional practices. Such association and practices may be related to the physical characteristics of the land (e.g. periodic inundation, faunal habitat, usability, navigability) rather than the land's absolute geographic location; and so it could be argued that, as the characteristics of the land shift location, so do the corresponding native title rights.



Denise Lovett of the Gundiṯjmara people at the Convincing Ground near Portland

Photo © The Public Land Consultancy

- (2) If climate change leads to more intensive intervention in coastal land, native title is likely to become an issue – both for the holders of the native title (who may stand to lose it) or the intervening authorities (which may need to acquire it). The interventions in question need not be physical works like groynes or retaining walls – but could also be in the form of the grant of tenures, the change of land status, the enactment of statutory regimes, or the making of regulations.²¹⁰
- (3) These interventions may be validated by *inter alia* Indigenous Land Use Agreements (**ILUAs**). The *Native Title Act 1993* (Cth) provides for three types of ILUA – area agreements, body corporate agreements and

²¹⁰ For definition of 'Act affecting native title' see sec 227, Native Title Act 1993 (C'wealth)

alternative procedure agreements. Of these the alternative procedure agreement would seem most appropriate if the implications of climate change were to be dealt with on a state-wide basis – but this is uncharted territory: no alternative procedure agreement has yet been made in Australia.

10.4 **Native Title - Coastal Climate Change**

- (1) Insofar as native title is related to the characteristics of land (as against the absolute location of the land) it needs to be established whether native title remains in its original location despite the change of characteristics, whether it moves with the migrating characteristics, or whether it is extinguished.
- (2) As government agencies address responses to coastal climate change, whether in the form of physical works, changes of land status, or changes in legislative regimes, it must be recognised that native title rights will be affected, and that consideration may need to be given to negotiating indigenous land use agreements on a scale and of a type not seen before.

10.5 **The Crown-Freehold Boundary**

- (1) For the majority of the Victorian coastline the Crown-freehold boundary lies some distance inland from the shore. In parts, it is many kilometres inland, but for most of the coast it lies much closer (perhaps 30 or 60 metres) to the shore.
- (2) For a minority of the coast, the Crown-freehold boundary lies at the HWM or even the low water mark (**LWM**) – leaving, in effect, no terrestrial Crown land. Nevertheless, this may be public land – Safety beach Dromana is freehold owned by Shire of Mornington Peninsula, as is Brighton beach between North Road and South Road, which vests in City of Bayside under the *Brighton Land Vesting Act 1877 (Vic)*.
- (3) A very small minority of the shoreline is freehold to HWM, and in private ownership. The VCS states that 96 percent of the coast is in public ownership, and 4 percent is private freehold.

- (4) In general, property boundaries may be defined by 'metes and bounds' or by reference to a topographic feature – such as the coast. We are unaware of what length of the coastal Crown-freehold boundary is defined in this manner – it will include not only those shorelines where the freehold extends to HWM or LWM, but also stretched where the boundary is defined to lie at some set distance from HWM or LWM.
- (5) Under the common law doctrine of accretion (or 'accretion and diluvion'), boundaries defined by their relationship with a topographic feature may move over time. If the feature itself moves 'gradually and imperceptibly' rather than as a result of artificial interventions or catastrophic events, it will be difficult to establish exact boundaries. This is not a hard-and-fast rule: it is possible for metes and bounds boundaries also to move as the topographic feature moves; and it is possible for the doctrine to apply even when the movement has been artificially induced²¹¹.
- (6) In many circumstances, Crown-freehold boundaries are unfenced or poorly marked. Properties abutting coastal Crown land utilise their boundary for practical access onto the beach – although it is not legal or as-of-right access, as would be the case for a road boundary²¹². In any event, this is not an issue that arises exclusively as a consequence of climate change. Usual coastal processes, such as erosion, have also caused changes to boundaries.
- (7) Encroachments onto coastal public land are common. For most of the coast, the public land is Crown land and therefore protected from adverse possession²¹³. Likewise, easement of long user is not recognised on Crown land.

211 See 'The Doctrine of Accretion' (paper DCE GUIDELINE NO: 02-20:0734-1) on the DSE website.

212 As codified in section 9 of the *Road Management Act* 2004.

213 Limitation of Actions Act 1958, sec 7.

10.6 The Crown-Freehold boundary; Commentary – Implications of Climate Change

- (1) Any program of acquisition of coastal freehold land would no doubt be prioritised according to a set of criteria; one such criterion could be the return of 100 percent of the coastline into public ownership.
- (2) In relation to the doctrine of accretion, the distinctions between artificial and natural, and between gradual and sudden are no longer meaningful – let alone of much value in policy terms. Likewise, distinctions based on the field practice of a 19th Century surveyor are of little or no value in attempting to deal with property rights in the face of 21st Century climate change.
- (3) Where the doctrine of accretion has effect, coastal processes are likely to erode private property, whilst allowing the public realm to migrate inland.
- (4) Where boundaries are defined by metes and bounds (i.e. where the doctrine does not have effect) coastal processes will not alter the boundaries, but may devalue the freehold, or even render it worthless. Here, the public realm will become narrower, or may even disappear. This has been seen as a matter of some concern in submissions to the House of Representatives Inquiry into Climate Change and the Environmental Impacts on Coastal Communities²¹⁴.
- (5) The VCS advocates the control of illegal access from private land and encroachment of private property and gardens onto coastal Crown land²¹⁵. As protection of coastal land becomes more important, more effective measures will be necessary to deal with unauthorised access and encroachments.
- (6) In relation to private encroachments onto coastal land, it is noteworthy that adverse possession is not possible where the land is Crown land or 'council land' within the meaning of the *Limitation of Actions Act 1958* –

214 For instance, the submission of the Byron Shire Council, NSW.

215 Victorian Coastal Strategy, 2008, page 30.

but that this definition does not cover all council-owned land. For instance, the council-owned freehold at Brighton and Dromana referred to earlier is unprotected.

10.7 **Issues relating to the Crown-freehold boundary**

- (1) Whether any of the coastline should remain in private ownership
- (2) Whether the law relating to topographically-defined boundaries should be reformed, and transferred from the common law to statutory law
- (3) Whether planning consent (or *Coastal Management Act* consent) should be required for private encroachments onto coastal land and access across freehold-Crown boundaries – even where they may have previously been regarded as pre-existing non-conforming works and/or usages.
- (4) Whether all coastal public land should be protected against adverse possession

10.8 **Crown Tenures**

- (1) Formal tenures on Crown land include Crown leases and Crown licences. These are made under various statutory powers – some generic (notably the *Land Act 1958* and the *Crown Land (Reserves) Act 1978*); others site-specific (e.g. the *St Kilda Land Act 1965*, the *Port Fairy Land Act 1983*, or the *Geelong Land (Steampacket Place) Act 1996* etc). There are also informal or non-statutory tenures, sometimes termed ‘permissive occupancies,’ authorised, condoned or tolerated by the relevant Crown land manager.
- (2) The law applies a straightforward test to determine whether a tenure is a lease or a licence: the former grants exclusive possession, the latter does not. Somewhat curiously, the High Court stated this test to be ‘beyond doubt’ but then proceeded to cast doubt on it :²¹⁶

²¹⁶ Taylor J in *Radaich v Smith* [1959] HCA 45; (1959) 101 CLR 209 (7 September 1959)

"... it must be taken as beyond doubt that in cases where there is a real contest between the issues of lease and licence the problem may be solved by considering whether the right which is conferred is a right to the exclusive possession of the property in question. This, however, does not deny that exceptional cases may arise in which it will be seen that a right to exclusive occupation or possession has been given without the grant of a leasehold interest."

- (3) The distinction is of some significance: if a tenure is a lease, it cannot be unilaterally revoked by the lessor; a licence is readily revoked by the licensor. A lease is regarded as conveying an interest – which may be acquired under the *Land Acquisition and Compensation Act 1986*; a licence also conveys an interest. A lease may be registered under the *Transfer of Land Act 1958*, which (up to a point) guarantees indefeasibility of title; a licence may not be so registered.
- (4) An important practical difference between freehold leases and Crown leases is that on Crown land, capital improvements are more likely to be made by the tenant than the landlord. Government bodies acting as landlords, including Councils, are less inclined or able than freehold landlords to invest their own funds into capital works.
- (5) In these circumstances, tenants seek (and governments grant) lease terms sufficiently long to amortise the tenant's capital investment – and lease terms on Crown land are becoming ever-greater.²¹⁷

10.9 **Crown tenures - Commentary – Implications of Climate Change**

- (1) Many tenures of Crown land purport to be licences, but in fact confer a right of exclusive possession. Examples include bathing boxes, boatsheds, and beach huts. The property market treats them as transferable interests: bathing boxes commonly sell for \$80,000; boatsheds sell for \$200,000.

217 The Crown Land Amendment (Leases and Licences) Act 2009 increased the normal maximum term for a Crown Land (Reserves) Act lease from 21 to 65 years.

- (2) It could perhaps be argued that many coastal 'licences' are indeed leases, under which the Crown has conveyed an interest to the tenant. If so, the landlord's powers of resumption are severely curtailed, as are the landlord's powers of intervention in the event of destruction – for instance by storm damage.
- (3) Whether they are leases or licences, many of these tenures have no effective termination date, and roll over *ad infinitum* at the discretion of the tenant. As well as running contrary to government's commitment to competition policy, this reinforces a false sense of proprietorship by tenants, who may well portray themselves to the market as 'owners'²¹⁸
- (4) As greater capital sums are required in response to climate change (consider for instance the raising of a sea-wall around a yacht club) tenants will expect ever-longer lease terms – a trend contrary to competition policy and contrary to government's ability to protect the long-term public interest. The problem is exacerbated by governments' reluctance to recognise the possibility of tenants' residual interest in an expiring lease.

10.10 Crown tenures – Issues

- (1) Whether coastal tenures purporting to be licences are indeed leases – with corresponding repercussions for their resumption or revocation
- (2) Whether government should take control of the market for property rights in non-statutory coastal tenures and those awarded without competition
- (3) Whether capital works arising from climate change should be funded by the landlord or the tenant, and how this should be reflected in the lease term and/or the tenant's residual interest.

218 A google search of bathing boxes and boatsheds for sale will reveal scores of examples.

11. Property Law Issues – Freehold Land

11.1 Introduction

- (1) The following summary seeks to provide an overview of property law issues that may arise in respect of coastal freehold land as a result of climate change impacts.
- (2) This summary is restricted to consideration of property law issues, as distinct from planning, building or environmental law issues, and focuses in particular on:
 - (a) common law doctrines and their relationship to coastal climate change impacts; and
 - (b) the implications of coastal climate change impacts on leases, easements and other property interests.
- (3) Climate change impacts that are expected to affect both private and Crown-owned coastal land include intense tropical cyclones, storms and winds, increased ground movement due to reductions in soil moisture, increased flood damage from intensified weather events and, most relevantly, inundation of low-lying land as a result of rising sea levels.
- (4) The majority of coastal frontages in Victoria are permanently reserved by the Crown for the protection of the coastline. Only approximately 4 percent are privately owned²¹⁹. Private properties abutting Crown-owned coastal land are also susceptible to the risk of coastal inundation which is expected to affect more than 80,000 coastal buildings in Victoria²²⁰.

219 Victorian Coastal Council (2008). Victorian Coastal Council (2008), "Victorian Coastal Strategy".

220 Department of Climate Change (2009), "Climate Change – Potential Impacts and Costs", Fact Sheet.

11.2 Doctrines of Accretion & Diluvion-

- (1) Whilst action is already being taken from a planning perspective to restrict future coastal development that may be at risk from coastal inundation, property owners must also be aware that when sea water encroaches onto dry land, this can have significant impacts on existing title boundaries under the common law doctrine of diluvion.
- (2) Under the common law doctrines of accretion and diluvion, land adjoining the sea can be increased or reduced in size if the boundary between the land and water is modified gradually through a 'slow and imperceptible' process that is not visibly apparent.
- (3) Under the doctrine of accretion, the boundary of land abutting the sea can be extended through "alluvion", which is the gradual increase of land as a result of the imperceptible addition of soil or retreat of water. Land gained through the gradual alluvion of the sea belongs to the owner of the adjoining land, whether that land is privately owned or owned by the Crown.
- (4) Conversely, under the doctrine of diluvion, the boundary of land abutting the sea can be diminished as a result of erosion and the gradual encroachment of the sea. In this case, land that has been encroached upon by water ceases to belong to the former owner and will be owned by the Crown instead²²¹
- (5) The rise in sea levels and associated inundation of low-lying properties in coastal areas that is predicted to occur as a result of climate change may have significant implications for property boundaries under the doctrine of diluvion described above.
- (6) Whether or not the property boundaries will shift when a body of water encroaches onto or recedes from dry land, depends upon two factors:
 - (a) how the boundary was originally defined; and
 - (b) how the shift occurred.

²²¹ *Environment Protection Authority v Leaghur Holdings Pty Ltd* (1995) 87 LGERA 282; 80 A Crim R 553.

11.3 Definition of boundaries

- (1) Coastal property boundaries in Victoria are generally defined in “metes or bounds”²²² or by reference to the HWM²²³ or some other water feature.
- (2) When the boundary of freehold land is defined by its relationship to the water such as the HWM, the doctrines of accretion and diluvion apply unless the title documents contain a clear expression to the contrary.
- (3) At common law, all land below the mean HWM belongs to the Crown²²⁴ subject to public navigational, fishing and ancillary rights. As rising sea levels cause changes to the HWMs in Victoria, private land boundaries that are defined in this manner will shift and the land under water will become vested in the Crown.
- (4) If the doctrine is excluded, then the title boundaries will remain unchanged and the land owner will retain title in the land that is covered by water. The doctrine can be excluded either expressly in the grant or transfer of land or impliedly through proof of clear and unequivocal intention to exclude²²⁵.
- (5) The doctrine generally does not apply to boundaries that are defined by metes and bounds. However, even if the boundary is measured by metes and bounds or is marked on the title as a “straight line”, the doctrine may still apply if extrinsic evidence shows that the boundary was actually intended to have been the sea boundary.

222 “Metes and bounds” are identified by a series of measured straights, with surveyed lengths and bearings.

223 The “high water mark” is assessed at common law by averaging out the tidal level reached by the highest and lowest tide of each lunar month over the period of a year - *Elliot v Earl of Morley* (1907) 51 Sol Jo 625; *Queensland v Beames* (2001) Q ConvR 54-533

224 *Blundell v Catterall* (1821)

225 *Williams v Wilcox* (1838) 8 Ad & El 314; 112 ER 857.

11.4 Type of shift

- (1) From a policy perspective, the doctrines of accretion and diluvion only allow a change in ownership where it is an ordinary consequence of 'long-term ownership of property inherently subject to gradual processes of change'²²⁶. The shift must have been gradual, imperceptible and permanent in nature.
- (2) There is no minimum time over which the change must take place. Even if the change has generally been gradual, but has at certain times been more noticeable, the doctrine may still be satisfied. Whether the change was gradual and imperceptible is a question of fact.
- (3) In order for the doctrine to apply, the shift must be permanent. Encroachment caused as a result of projected sea rise is therefore likely to affect property boundaries, whereas inundation caused by a sudden storm or weather change will not²²⁷.
- (4) The doctrine applies primarily to changes brought about by natural forces but may also operate if the shift resulted from some artificial cause such as construction of a groyne or upstream dredging, so long as the change was not deliberate. If the shift was deliberate and artificial (e.g. reclamation by landfill) then the boundary remains where it was regardless of whether it was a topographic-feature boundary or a metres-and-bounds boundary.

²²⁶ *Southern Centre of Theosophy Inc v South Australia* [1982] AC 706

²²⁷ *Environment Protection Authority v Leaghur Holdings Pty Ltd* (1995) 87 LGERA 282; 80 A Crim R 553.

11.5 Freehold land - Implications of climate change

- (1) The two key requirements of the doctrine of diluvion are that the change must be gradual and imperceptible and must appear at the time to be a permanent condition. Both these requirements are readily satisfied by coastal inundation which is predicted to occur over a number of decades with permanent effect.
- (2) The doctrine of diluvion does not only threaten properties that are immediately adjacent to the sea. Whilst the doctrine does not immediately affect boundaries between adjoining properties, if the rise in sea level is so significant that properties become completely inundated and the water encroaches onto adjoining properties, then the doctrine may threaten these titles too.
- (3) Certificates of title can be amended to reflect the increase or reduction in land as a result of accretion or diluvion. In the case of the accretion of Crown land to freehold, private landowners may apply to the Registrar of Titles to have the title boundary extended. Whilst in the case of diluvion the Crown can theoretically apply to have titles amended to show that former freehold land has become Crown land, there is no record of this ever having occurred²²⁸. In the event that significant sea level rise does occur, the Crown may become more likely to exercise this right to ensure that the Land Register does not retain private interests in land that has become completely inundated.

228 DSE Guideline No 02-20:0734-1, pg.9.

11.6 Tenures – Leases, licences, easements and rights of support

(1) Leases, easements and other property instruments may become invalid or be terminated if the subject land is compromised by inundation as a result of climate change impacts. Depending on the type of tenure, landowners may potentially be liable for damages.

(2) Leases

(a) A lease confers exclusive possession of land for an ascertainable period of time. In the event that land becomes severely affected by climate change impacts, the tenant and/or the landlord may wish to terminate the lease, or the tenant may seek damages for interruption to their rights under the lease.

(b) During the term of the lease, tenants are entitled to quiet enjoyment and the landlord is obliged to keep the premises in good repair. If the landlord breaches either of these covenants, the tenant may be entitled to damages including all consequential losses²²⁹. Even if the landlord has been prevented from performing the covenant, the tenant may still be entitled to damages for breach²³⁰.

(c) Under the common law, if leased premises were destroyed or rendered unfit for use by flood or other natural events, the lease remains on foot and the tenant's obligation to pay rent remain²³¹. Many leases now contain a specific abatement of rent clause where the obligation to pay rent ceases and the lease comes to an end upon the giving of notice.

(d) Whether or not a landowner will be required to repair or rebuild the premises in the event that they are damaged or destroyed will depend upon the terms of the lease. Some statutory provisions

229 *Calabar Properties Ltd v Sticher* [1983] 3 All ER 759.

230 *Re De Garis and Rowe's Lease* [1924] VLR 38.

231 *Matthey v Curling* [1922] 2 AC 180 at 237.

may also affect the obligations of parties to a lease in the event that premises are damaged or destroyed²³².

- (e) If the tenant no longer wishes the lease to continue, the tenant may seek to “surrender” the lease and yield the property up to the landlord before the lease was due to expire. This will only be valid if the surrender is accepted by the lessor.
- (f) Contractual principles including the doctrine of frustration apply to leases, but only in very rare circumstances. In the event that a frustrating event is found to have occurred, the lease will be automatically discharged. The destruction of the premises may be sufficient to amount to a frustrating event²³³. This is likely to apply where, for example, a house is completely destroyed by severe weather events.
- (g) Leases that are registered under the *Transfer of Land Act 1958* have guaranteed indefeasibility of title and bind subsequent purchasers. A lease or licence which is not registered under the *Transfer of Land Act 1958* will need to be amended if a change in ownership occurs.

(3) Licences

- (a) As distinct from a lease, a licence is an agreement which grants permission to a licensee to enter land for specific purposes²³⁴. A licence cannot be registered²³⁵. Beyond the obligation to give reasonable notice of revocation of a licence²³⁶, a landowner is unlikely to have any continuing obligations to the licensee if the subject land becomes affected by sea level rise as the licensor can simply revoke the licence.

232 See, for example, section 57 of the *Retail Leases Act 2003*.

233 *Cricklewood Property and Investment Trust Ltd v Leighton's Investment Trust Ltd* [1945] AC 221.

234 Halsbury's Laws of Australia (2009), Chapter 245 – Leases and Tenancies, 245I(3) “Licences”, LexisNexis Australia.

235 *Narooma Hotels Pty Ltd v Champion* [1961] NSW 464; [1961] SR (NSW) 473 at 478

236 *Murray Robson Wines Pty Ltd v Oakland Vineyards Pty Ltd* (1990) NSW ConvR 55-508

- (b) If the grantor is no longer entitled to possession of the land, the licence will be revoked²³⁷. A landowner will therefore be relieved of their obligations to the licensee if the Crown ever sought to take ownership of freehold land under the doctrine of diluvion.

(4) **Easements**

- (a) An easement, such as a right of way, grants a right to pass over or use land, but only to the extent that the particular instrument (easement) allows. Easements are registered on title and therefore bind subsequent property owners.
- (b) Where the site of an easement falls into disrepair, including as a result of damage caused by climate change impacts, there is no obligation on the grantee to repair the site unless the particular easement specifically imposes an obligation to do so²³⁸.
- (c) If the damage is so substantial that it amounts to an obstruction of the right of way and prejudices the grantee of the right, the grantor may be liable for damages in nuisance²³⁹.
- (d) If the subject land becomes so affected by climate change that the easement is substantially compromised, the landowner should arrange, by agreement with the grantee, to have the easement released and removed from title by the Registrar²⁴⁰.

237 *Terunnanse v Terunnanse* [1968] AC 1086 at 1095, 1096 per Lord Devlin

238 *Hancock v Wilson* [1956] St R Qd 266 at 272 per Stanley J.

239 *Powell v Langdon* (1944) 45 SR (NSW) 136

240 An easement remains effective until it is removed from the Register under section 73 of the *Transfer of Land Act* 1958.

(5) **Right of support**

- (a) Ownership of land in common law jurisdictions carries with it the right of support. This is the right to receive sufficient support from a neighbouring property to enable your land to maintain its natural level²⁴¹.
- (b) Withdrawal of support of land is a nuisance under the common law²⁴². Any person who removes the support of land may therefore be liable for damages if the withdrawal interferes with the neighbour's use and enjoyment of land. This is a strict liability offence and therefore arises whether or not there has been negligence.
- (c) Erosion arising from ordinary use of the land is not actionable²⁴³, but this action may arise in the context of climate change if neighbours fail to mitigate the effects of storms, inundation and other impacts or if their actions in seeking to protect their property compromise a neighbour's right of support.

11.7 **Leases, licences and easements - Implications of climate change**

- (1) Leases, easements and other property instruments that might otherwise be compromised if the subject land is affected by coastal inundation may need to be amended or cancelled to reflect any changes in the ownership or status of the land as a result of climate change impacts.
- (2) In respect of leases, landowners may be liable for damages. Landowners may also be liable for damages in nuisance where they have interfered with the right of support or have substantially obstructed an easement.

241 *Backhouse v Bonomi* (1861) 9 HL Cas 503.

242 Halsbury's Laws of Australia (2009), Chapter 415 – Tort, 415(3) "Nuisance", LexisNexis Australia.

243 *Rouse v Gravelworks Ltd* (1940) 1 KB 489; *Barbagallo v J & F Catelan Pty Ltd* [1986] 1 Qd R 245.

12. Communicating risks

12.1 Introduction

- (1) There are policy frameworks and provisions in place which administer the planning and management of Victoria's coastal environment. Such frameworks and provision range from state-wide approaches, such as State Environment Protection Policies (**SEPPs**), to regional and local-scale tools such as local planning policies in planning schemes as well as Coastal Action Plans and other management plans that focus on particular coastal issues and circumstances²⁴⁴.
- (2) The VCS sets out the actions to be undertaken to ensure the community appreciates the impacts and risks to coastal ecosystems and coastal cultural heritage²⁴⁵.
- (3) This section of the Briefing Report seeks to provide an overview on communicating the risks that are associated with coastal land and climate change to prospective purchasers and current owners²⁴⁶.
- (4) It may be appropriate to advise landowners and prospective purchasers of land concerning risks relating to intense tropical cyclones, storms and winds, increased ground movement due to reductions in soil moisture, increased flood damage from intensified weather events, and predicted rise in sea levels.

244 E.g. Victorian Coastal Strategy 2008, Victorian Coastal Council, 10 December 2008.

245 Part 2.4 of the Victorian Coastal Strategy 2008 sets out the following actions to be undertaken to provide coastal education to the communication:

- a) Continue monitoring community attitudes to Victorian coastal and marine environments through longitudinal social research to ensure a clear understanding of community perceptions to coastal conservation and management;
- b) Convene a marine and coastal education taskforce to coordinate statewide education activities and priorities and develop a marine and coastal education strategy with key education providers;
- c) Actively seek opportunities for community involvement in coastal education, management, monitoring and planning, through community network, with particular emphasis on those groups that are under-represented, such as young people and people of diverse cultural backgrounds; and
- d) Deliver training to planners and managers for effective decision-making.

246 It is policy under part 2.1 of the Victorian Coastal Strategy 2008 to plan for sea level rise of not less than 0.8 metres by 2100, and allow for the combined effects of tides, storm surges, coastal processes and local conditions, such as topography and geology when assessing risks and impacts associated with climate change. As scientific data becomes available the policy of planning for sea level rise of not less than 0.8 metres by 2100 will be reviewed.

- (5) Communicating property risks may be done through section 32 statements (under the *Sale of Land Act 1962*), section 173 agreements (under the *Planning and Environment Act 1987*), and planning certificates. However, unless a particular zone or overlay is created for sensitive coastal land, it may be difficult for the risks of climate change to be communicated in a consistent manner.

- (6) This chapter does not provide an analysis on the appropriateness of each particular method of communicating the risks of climate change. Furthermore, it is acknowledged that there may be a degree of public concern over the imposition of certain controls, e.g. a new zone or overlay, or a statutory covenant, which may result in a devaluation of private land.

12.2 Property Instruments and Legislation

(1) Section 32 Statement

- (a) Under section 32 of the *Sale of Land Act 1962*, a statement must be provided to prospective purchasers of land regarding all matters which affect the land to be sold. Section 32 sets out the matters that must be included in the statement.
- (b) For example, section 32(2)(c) requires disclosure of planning scheme and planning control details.
- (c) Section 32(2)(cb) requires the following warning to be provided to purchasers:

“Important notice to purchasers: The property may be located in an area where commercial agricultural production activity may affect your enjoyment of the property. It is therefore in your interest to undertake an investigation of the possible amenity and other impacts from nearby properties and the agricultural practices and processes conducted there.”

- (d) It may be considered appropriate for section 32 of the Act to be amended to require prospective purchasers to be given notice of climate change risks in a section 32 statement.
- (e) For example, the Act could be amended to insert the following as a new section 32(2)(cc):

“Important notice to purchasers: The property may be located in a sensitive area which is subject to the effects of climate change. It is therefore in your interests to undertake an investigation of the potential coastal hazards in the area and the management techniques required to preserve the land to allow continued enjoyment of the land.”

(2) Planning Certificate

- (a) A planning certificate is often used as a means of disclosing details of the planning scheme and planning controls that apply to a site, as required by section 32(2)(c) of the *Sale of Land Act 1962*.
- (b) A planning certificate indicates the zoning and overlays that apply to a site. If the zoning and overlays indicate that the site is at risk due to the effects of climate change, a planning certificate may be an appropriate mechanism to communicate that risk to a prospective purchaser.
- (c) See below for further discussion on the appropriateness of using an overlay or zone to control and manage land that is potentially affected by climate change.

(3) Restriction on Title

- (a) A section 173 agreement may be registered on title. If a section 173 agreement is registered on title, it is binding on future purchasers of the land. The use of section 173 agreements to address and manage the risk of damage to land caused by climate change is discussed further below.
- (b) A statutory covenant registered on title may also be a means of communicating the risks of climate change. In Queensland, the *Nature Conservation Act 1992* (Qld) utilises statutory covenants in some circumstances as a means of securing nature refuge agreements. A nature refuge is a 'protected area' under the *Nature Conservation Act*²⁴⁷, which means that certain environmental obligations are imposed upon the landowner²⁴⁸. A nature refuge may be entered into voluntarily or, in some circumstances, it may be compulsorily declared by the

247 *Nature Conservation Act 1992* (Qld) s 14(h).

248 Justine Bell and Sharon Christensen, *Use of Property Rights Registers for Sustainability – A Queensland Case Study* (2009) 17 APLJ.

Minister²⁴⁹. If the Minister makes such declaration, or the agreement is entered into by consent, a conservation covenant is registered over the land.

- (c) A similar type of agreement may be appropriate for particularly fragile or sensitive coastal land. Examples of obligations which may be sought to be imposed include requirements to:
 - (i) measure the effects of climate change on a property; and
 - (ii) carry out mitigation works to prevent damage from rising sea levels or storm damage.

249 *Nature Conservation Act 1992* (Qld) s 49.

12.3 Use of Planning Controls to Communicate Risks

- (1) Amendment to the Planning Scheme
 - (a) Ministerial Direction No. 13 set outs general requirements for the consideration of the impacts of climate change within coastal Victoria as part of a planning scheme amendment which would have the effect of allowing non-urban land to be used for an urban use and development²⁵⁰.
 - (b) Pursuant to this Direction, in preparing a planning scheme amendment, a planning authority must include in the explanatory report how the amendment addresses a number of factors²⁵¹. This Direction therefore requires planning authorities to consider the risks of climate change in certain rezoning proposals.
- (2) Application of a Zone
 - (a) A special zone may be applied to coastal land which has been identified as being at risk from the effects of climate change²⁵².
 - (b) An example of a zone which operates by analogy is the Urban Floodway Zone (**UFZ**). The UFZ seeks to ensure that any development within that zoning maintains the free passage and temporary storage of floodwater, minimises flood damage and is compatible with flood hazard, local drainage conditions and the minimisation of soil erosion, sedimentation and silting. Under

250 Ministerial Direction No.13, *Managing Coastal Hazards and the Coastal Impacts of Climate Change*, Justin Madden MLC, Minister for Planning, 18 December 2008.

251 A planning authority must include in the explanatory report how the proposed amendment:

- Is consistent with the policies, objectives and strategies for coastal Victoria as outlined in Clause 15.08 of the SPPF.
- Addresses the current and future risk and impacts associated with projected sea level rise and the individual and/or combined effects of storm surges, tides, river flooding and coastal erosion.
- Is based on an evaluation of the potential risks and presents an outcome that seeks to avoid or minimize exposing future development to projected coastal hazards.
- Ensures that new development will be located, designed and protected from potential coastal hazards to the extent practicable and how future management arrangements will ensure ongoing risk minimization.
- Considers the views of the relevant floodplain manager and the Department of Sustainability and Environment.

252 See land identified in the policy contained within Part 2.1 of the Victorian Coastal Strategy 2008.

clause 34.05 of the VPPs, An application under the UFZ must either be consistent with a local floodplain development plan if incorporated under the Scheme, or if no such plan is incorporated then a flood risk report must accompany an application²⁵³. By analogy, a coastal hazard report may be required to accompany a permit application made under a zone that applies to sensitive coastal land.

- (c) The benefit of applying a specific zone to land “at risk” is that the use of the land can be controlled by the responsible authority. The zone control may also require a responsible authority to consider relevant documents (such as coastal development plans or strategies) when making a decision on a permit application. It may also require a permit application to be referred to a relevant coastal land management authority.

(3) Application of an Overlay

- (a) The use of an overlay to communicate risks for particularly sensitive, low-lying coastal land should also be considered.
- (b) An overlay may for example restrict or prohibit any building or works within a particular setback from the shoreline.
- (c) It is noted that overlays generally only regulate development, not use, and they do not change the intent of the zone which applies to the land.

(4) Standard Statewide Provision

All planning schemes contain a set of standard State-wide policies (the SPPF) and Particular Provisions (Clause 52) which are specified in the VPPs. Clause 15.08 of the SPPF relates to planning for, and management of, the potential coastal impacts of climate change. This provision contains comprehensive regulations regarding managing the coastal hazards and impacts of climate change.

253 Clause 37.03-4 of the Victorian Planning Provisions.

12.4 Potential for an Integrated Land Register

- (1) Practices have developed in parts of Australia for the recording of property rights in natural resources either on separate registers with no link to the Torrens register, or on a separate register which is managed by the Registrar of Titles but has no legal effect on the title to the land²⁵⁴. The disclosure of information on restrictions on title through a register is generally an accepted approach²⁵⁵. If a public register is appropriately structured, it has the benefit of providing easy and cheap access to reliable information²⁵⁶.
- (2) Queensland Example
 - (a) In Queensland, there is an Administrative Advices Register (**AAR**), maintained by the Registrar of Titles, which records information necessary or desirable for the effective or efficient operation of the title register²⁵⁷. The information recorded in the AAR is not binding on the landowner merely by reason of its recording and depends for its enforceability on the authorising statute²⁵⁸.
 - (b) There are a number of Queensland statutory restrictions which seek to promote sustainable management of natural resources and are recorded as administrative advices. An example of a statutory restriction which is recorded as an administrative advice is a coastal protection notice issued under the *Coastal Protection and Management Act 1995* (Qld). Under section 59 of that Act, a landowner may be served with a coastal protection notice requiring them to take stated action, or cases a stated activity²⁵⁹. Where such a notice is given, it must be notified to the Registrar

254 Justine Bell and Sharon Christensen, *Use of Property Rights Registers for Sustainability – A Queensland Case Study* (2009) 17 APLJ

255 Ibid.

256 T Stutt, *Transitions to Torrens: The Six-Fold Path to the Ideal Land Administration System* (2008) 15 APLJ 115.

257 Land Title Act 1994 (Qld) s 34.

258 Justine Bell and Sharon Christensen, *Use of Property Rights Registers for Sustainability – A Queensland Case Study* (2009) 17 APLJ

259 *Coastal Protection and Management Act 1995* (Qld) s 59(2).

within a reasonable time and recorded on title as an administrative advice²⁶⁰.

(3) Victorian Example

- (a) The Priority Sites Register is maintained by the Environmental Protection Authority. Priority sites are sites for which the EPA has issued a clean-up notice or a pollution abatement notice pursuant to the provisions of the *Environment Protection Act 1970*. Typically, priority sites are areas where pollution of land and/or groundwater presents an unacceptable risk to human health or the environment. The sites require active management to reduce risks to people and the environment, including clean-up and monitoring²⁶¹.
- (b) The Priority Sites Register lists all priority sites, and is available to the general public. It is noted that the Register does not list sites which are managed by voluntary agreements (e.g. a section 173 agreement) or sites subject to management by planning controls. A site is removed from the Register once all conditions on a notice have been complied with.
- (c) A recognised shortcoming of the Priority Sites Register is that it is not updated often enough to reflect that land that has been registered and de-registered. A vigilant updating system needs to be maintained in order to ensure the effectiveness and efficiency of the register.
- (d) Whilst land which is subject to impact from climate change is clearly distinguishable from land which is polluted and requires clean-up, it is land which could be monitored for the degree of climate change risks affecting the land.

260 *Coastal Protection and Management Act 1995* (Qld) s 63(2), (3).

261 http://www.epa.vic.gov.au/land/contam_site_info.asp

- (4) An Integrated Register?
- (a) The recording of restrictions on use or compliance obligations as administrative advices in Queensland has gone some way to facilitating the communication of information to landowners, potential landowners and other government departments²⁶². However, the maintenance of separate registers for which significant information concerning land use is recorded, or not recording the information at all, continues to present a significant barrier for the following reasons²⁶³:
- (i) Landowners who are unaware of or are unable to find all interests or restrictions affecting their land may use the land in ways which are inconsistent with environmental obligations thereby impacting on sustainable management of resources on their land and possibly neighbouring properties²⁶⁴; and
- (ii) The legal effect of statutory restrictions, whether they are recorded as administrative advices or not, take effect according to the statute under which they are created. The inconsistency in legislative drafting makes it difficult, without the benefit of a judicial interpretation, to advise if the particular statutory restriction operates *in personam* or *in rem*, unless the legislation specifically states that the restriction attaches to the land and applies to successors in title²⁶⁵.
- (b) Therefore, it may be appropriate for an integrated register to be introduced in Victoria that provides information to the public regarding all land interests, restrictions, and impediments to land use. Creating such a register could serve two purposes:

262 Justine Bell and Sharon Christensen, *Use of Property Rights Registers for Sustainability – A Queensland Case Study* (2009) 17 APLJ.

263 *Ibid.*

264 E.g. *Burns v Queensland and Croton* [2006] QCA 235; BC200604622

265 *Ibid.* For an example of where legislation specifically states that the restriction attaches to the land and applies to successors in title, see *Vegetation Management Act 1999* (Qld) s 55(11).

- (i) It would provide a “one-stop-shop” for the public to understand all of the interests and restrictions relating to land, including whether the land is subject to risk of damage caused by climate change; and
- (ii) The public would be then able to understand what management measures are in place and will need to be maintained in order to limit the effects of climate change and maintain their enjoyment of the land.

12.5 Use of section 173 agreements

- (1) Some Councils favour a requirement for section 173 agreements within an LSIO area to both provide further notice of the flooding risk and to regulate development of the land in the future.
- (2) Some Councils are also making reference to coastal hazard vulnerability assessments in section 173 agreements to pick up both notification of the assessments and enforcement of any ongoing requirements contained in the assessments.
- (3) It is undoubtedly true that section 173 agreements, because they run with the land, can provide a very useful tool in ensuring that all parties both present and future know about the 'carbon compromise' nature of the land. However, there may be arguments that in using such agreements, Councils may be in breach of their statutory duty by authorising a development that is at risk due to the effects of climate change rather than refusing to approve the development.
- (4) A difficulty for Councils is that at the time decisions need to be made in relation to a development, the exercise of the precautionary principle may require this conservative approach.
- (5) Many authorities have been justifiably reluctant to use section 173 agreements as merely a notice tool having regard to the requirement of the *Planning and Environment Act* that the agreement must serve a planning purpose.

- (6) The use of section 173 agreements on an ad hoc basis may also lead to some puzzling decisions where one block is subject to a section 173 agreement but a neighbouring block is not. The proper planning in the area might therefore be fundamentally compromised.

13. **Summary of the jurisprudence and application of the precautionary principle in Victoria and other jurisdictions**

13.1 **The precautionary principle**

- (1) The precautionary principle was defined in the Rio Declaration²⁶⁶ as:

Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation.

- (2) The Rio Declaration arose from the 1992 United Nations Conference on Environment and Development, also known as the Earth Summit.

- (3) The United Nations Framework Convention on Climate Change²⁶⁷ was also signed at this conference. Article 3(3) of the Convention advocates that a precautionary approach be taken to mitigate the adverse effects associated with climate change:

- (a) The parties should take precautionary measures to anticipate, prevent or minimize the causes of climate change and mitigate its adverse effects. Where there are threats of serious or irreversible damage, lack of full scientific certainty should not be used as a reason for postponing such measures, taking into account that policies and measures to deal with climate change should be cost-effective so as to ensure global benefits at the lowest possible cost. To achieve this, such policies and measures should take into account different socio-economic contexts, be comprehensive, cover all relevant sources, sinks and reservoirs of greenhouse gases and adaptation, and comprise all economic sectors. Efforts to address climate change may be carried out cooperatively by interested parties.

²⁶⁶ *Rio Declaration on Environment and Development* (UNCED, 15/06/92, Doc A/CONF.151/26), Principle 15.
²⁶⁷ <http://unfccc.int/2860.php>

13.2 Jurisprudence and application of the precautionary principle in Victoria and other jurisdictions

- (1) A leading case on the precautionary principle is *Leatch v National Parks & Wildlife Service*²⁶⁸. Stein J's decision in this case highlighted the role of the precautionary principle in improving the quality of environmental impact assessment.
- (2) When this case was heard, the nature and extent of a listed threatened species in the project area was not known. The Council had submitted a Fauna Impact Statement that, despite the lack of any specific evidence, concluded that the project would not have any adverse impacts on that species because the area was a degraded natural habitat.
- (3) Stein J applied the precautionary principle to prevent the development proposal from proceeding until there was sufficient information to enable a proper environmental impact assessment to be carried out. His Honour stated:

The precautionary principle is a statement of common sense and has already been applied by decision-makers in appropriate circumstances prior to the principle being spelt out. It is directed towards the prevention of serious or irreversible harm to the environment in situations of scientific uncertainty. Its premise is that where uncertainty or ignorance exists concerning the nature or scope of environmental harm (whether this follows from policies, decisions or activities), decision makers should be cautious²⁶⁹.

- (4) The Administrative Appeals Tribunal in *Re De Brett Investments Pty Ltd and Australian Fisheries Management Authority*²⁷⁰ noted that the application of the precautionary principle involves assessing the gravity and likelihood of risks. The Tribunal stated:

268 (1993) 81 LGERA 270
269 at 282
270 (2004) 82 ALD 163

At the practical level for us, the precautionary principle means that we must assess whether there is an indication that there will be some serious or irreversible environmental damage if a certain course is followed, including the course of taking no action at all. That means that we must assess the possible consequences and gravity of those courses being followed together with the risk of those consequences occurring. That assessment must be carried out having regard to all sources of evidence; it is not limited to scientific evidence.

If the assessment leads us to conclude on the balance of probabilities that there is a threat of serious or irreversible damage to the environment that is not a bare possibility, full scientific certainty in the sense we have explained that concept should not be used as a reason for postponing measures to prevent environmental degradation. Caution should be exercised. The outcome of our assessment in applying the precautionary principle must be weighed with the other objectives in ... the Act and a decision reached²⁷¹.

- (5) In *Telstra Corporation Ltd v Hornsby Shire Council*²⁷², Preston CJ and Commissioner Brown discussed the conditions precedent that trigger the application of the principle. They stated:

The application of the precautionary principle and the concomitant need to take precautionary measures is triggered by the satisfaction of two conditions precedent or thresholds: a threat of serious or irreversible environmental damage and scientific uncertainty as to the environmental damage. These conditions or thresholds are cumulative. Once both of these conditions or thresholds are satisfied, a precautionary measure may be taken to avert the anticipated threat of environmental damage, but it should be proportionate...

271 at 208
272 [2006] NSWLEC 133

Two points need to be noted about the first condition precedent that there be a threat of serious or irreversible environmental damage. First, it is not necessary that serious or irreversible environmental damage has actually occurred - it is the threat of such damage that is required. Secondly, the environmental damage threatened must attain the threshold of being serious or irreversible²⁷³.

- (6) The Court went on to note that the type and level of precautionary measures that will be appropriate will depend on the combined effect of the degree of seriousness and irreversibility of the threat and the degree of uncertainty. This involves assessment of risk in its usual formulation, namely the probability of the event occurring and the seriousness of the consequences should it occur²⁷⁴
- (7) The precautionary principle has been discussed and applied in a number of VCAT and Victorian Supreme Court cases.
- (8) In *Western Water v Rozen & Anor*²⁷⁵, the Supreme Court noted that the application of the principle is influenced by the particular risk in issue. It stated:

That meaning [of the term 'precautionary principle'] is not to be ascertained by reference to a judicial gloss on the meaning of the words used to state the principle. The decisions of previous tribunals of fact may offer useful guidance in a particular case but they do not define the principle. The meaning is on the other hand plainly intended to be informed by scientific understanding of the risk in issue in a particular case²⁷⁶.

- (9) A significant question arising from the application of the principle is whether it imposes a burden of proof on a permit applicant to prove that there will be no detrimental environmental impacts caused by the proposal.

273 at [128] – [129]
274 at [161]
275 [2008] VSC 382
276 at [97]

- (10) This issue was discussed by the Tribunal in *Kroger v Southern Rural Water*²⁷⁷.
- (11) In that case, VCAT approved the grant of a licence to construct and operate stream works on a waterway under section 67 of the *Water Act 1989* (Vic). Section 68 of the *Water Act* specifies the matters that the decision-maker must take into account when making a decision under section 67. The applicant submitted that section 68 of the Act only requires the decision-maker to consider adverse effects which are 'likely'. It contended that there was no evidence, as distinct from 'speculation or conjecture', that the dam would in any way affect in-stream uses of water in the creek.
- (12) The Tribunal stated:

In our view, the submission by Mr Wright QC and Mr Delaney [on behalf of the applicant] that the relevant paragraphs of section 68 of the *Water Act* require the decision-maker to consider only adverse effects which are 'likely' tells against the application of the precautionary principle in circumstances such as these²⁷⁸.

- (13) However, the Tribunal went on to hold that the application of the precautionary principle does not impose a burden of proof on the applicant. It stated:

In our view it is preferable in the present proceeding to avoid disposing of it upon the basis either that a particular burden of proof lies upon the applicant conclusively to negative any potential adverse effects to the environment or that the burden of proof lies upon the respondent and the Secretary to prove that adverse environmental affects are "likely". We propose determining this matter by way of positive findings without resort to suggested burdens of proof one way or the other. Commonsense and the overall policy and purposes of the *Water Act* indicate nevertheless that a degree of caution should be

277 [2001] VCAT 1334
278 at [53]

adopted. The provisions which we have quoted in the Water Act show that environmental values are to be protected and are highly valued. It goes without saying that if action is taken which would compromise those values, the damage may be irreversible. Those considerations indicate that findings in favour of an applicant such as the present should only be made after proper consideration and due deliberation²⁷⁹.

- (14) The Tribunal concluded that on the basis of the evidence before it, the licence should be granted.
- (15) More recently, the Tribunal has observed that ‘the precautionary principle is not a prohibition, but is more about balancing competing interests and assessing the probability of risk of some irreversible environmental damage occurring’²⁸⁰.
- (16) Another relevant issue is what type of environmental damage invokes the application of the principle.
- (17) In *Rozen v Macedon Ranges SC*²⁸¹, the Tribunal upheld an appeal against the Council’s decision to refuse to grant a permit for the development of four dwellings that were to be serviced by a septic sewerage system. Western Water supported the Council’s refusal of the permit, relying on the evidence of Dr O’Connor regarding the impact of the development on water quality.
- (18) The Tribunal stated:

The [precautionary] principle addresses risks that are of a serious or irreversible environmental damage. This is an important point and implies that the risk of environmental damage is to be so severe as to impose some long term liability to future generations (i.e. it draws in the principle of intergenerational equity)²⁸². (emphasis added)

279 at [55]

280 *Greentree v Colac Otway Shire Council* [2005] VCAT 815 at [45]

281 [2007] VCAT 1814

282 at [127]

- (19) The Tribunal considered that the event that Dr O'Connor considered may occur as a result of the development (namely the outbreak of contagious disease), while serious, was not one of *irreversible environmental damage* in the context of the precautionary principle. Therefore, the Tribunal did not consider that it would be a proper application of the principle to deny development approval on the basis of that evidence.
- (20) Western Water appealed the Tribunal's decision to the Supreme Court. One of the grounds of the appeal was that the Tribunal misapprehended and misstated the precautionary principle, by taking the position that a risk of *irreversible environmental damage* was necessary to invoke the principle.
- (21) The Supreme Court accepted this submission, and upheld the appeal²⁸³.
- (22) In relation to the risk of harm necessary to invoke the precautionary principle, the Supreme Court in *Rozen* stated that it is not necessary that such a risk be so severe as to impose some long term liability to future generations. It stated:
- If there is a risk of serious environmental damage it need not be one of irreversible environmental damage in order for the principle to be invoked²⁸⁴. (emphasis added)
- (23) The Supreme Court held that the Tribunal did not recognise the true nature of the precautionary principle. It also held that the Tribunal did not apply the principle to a significant matter recognised in the relevant potable water supply guidelines and the Planning Scheme, namely the cumulative risk of adverse impacts to water quality resulting from successive residential development.

283 *Western Water v Rozen Anor* [2008] VSC 382
284 at [103]

13.3 The relevance of the precautionary principle to coastal planning and climate change

- (1) As discussed above, the precautionary principle has its roots in the *prevention of environmental degradation*.
- (2) The principle is relevant to the issue of coastal planning and climate change. For example, the principle can be applied as a basis for regulating development in an effort to:
 - (a) *minimise* climate change (for example by regulating development that would result in the emission of greenhouse gas emissions);
or
 - (b) *minimise* the effects of climate change (for example by regulating development that would exacerbate coastal erosion, or that would cause a loss of habitat or biodiversity).
- (3) For example, in *Gray v Minister for Planning*²⁸⁵, the principle was applied to uphold a challenge against the development of a coal mine. The applicant challenged the decision of the Director – General under section 75H of the *Environment Planning and Assessment Act 1979* (NSW) to accept that the environmental assessment prepared by the project proponent adequately addressed the relevant environmental assessment requirements. One of the requirements was for a 'detailed greenhouse gas assessment'.
- (4) Pain J in the Land and Environment Court held that the Director-General had an implied obligation to take into account the public interest when making a decision under section 75H, which included the principles of ecologically sustainable development (ESD). Furthermore, applying the principles of intergenerational equity and the precautionary principle, the Director-General was required to consider greenhouse gas emissions:
 - (a) from sources owned or controlled by the coal miner;

285 (2006) 152 LGERA 258

- (b) from the generation of purchased electricity consumed by the coal miner; and
 - (c) from sources not owned or controlled by the coal miner, as a consequence of the activities of the coal miner (including emissions from the burning of coal originating from the coal mine by third parties).
- (5) Pain J held that the Director- General had failed to adequately take these relevant matters into account.
- (6) An issue to consider is the relevance of the precautionary principle to the regulation of development that is aimed at assisting us to *adapt* to climate change in order to prevent economic and social losses.
- (7) In terms of *adapting* to climate change, a key issue for developments on the coast is the impact of the environment (i.e. sea level rise and coastal hazards) on the development, as opposed to the impact of the development on the environment. Development in such areas may be regulated to prevent environmental degradation, such as biodiversity loss, water degradation or habitat fragmentation. However, it may also be regulated so as to prevent economic and social losses in the future. It is arguable that the precautionary principle, at least as defined in the Rio Declaration, is not directly applicable to the issue of *adapting* to climate change so as to prevent economic and social losses.
- (8) Notwithstanding this, the precautionary principle has been referred to in policy documents and several decisions of relevant Courts and Tribunals in this context. In some cases, it appears that the terms 'precautionary principle' and 'precautionary approach' have been used interchangeably.
- (9) For example, the *Coastal Spaces – Recommendation Report 2006* states:

The Precautionary Principle advocates taking action now despite a level of uncertainty, to minimise future risks. This principle may lead to a decision not to take action or proceed with a proposal

because of a high level of uncertainty about beneficial outcomes²⁸⁶.

- (10) The VCS states:

Adoption of a precautionary strategy suggests that a policy of planning for sea level rise of not less than 0.8 metres by 2100 should be adopted. This policy will be reviewed as scientific data becomes available or when national benchmarks are established²⁸⁷. (emphasis added)

This strategy contains a range of policies and actions to help prepare Victoria's coastal communities for the impacts associated with climate change. In particular, it is policy in this strategy to apply the precautionary principle to planning and management decision making when considering the risks associated with climate change. The precautionary principle is a 'common sense' notion that requires decision-makers to be cautious when assessing potential health or environmental harms in the absence of the full scientific facts²⁸⁸. (emphasis added).

- (11) The *Managing Coastal Hazards and the Coastal Impacts of Climate Change* General Practice Note refers to the need to take a 'precautionary approach'. It states:

The precautionary approach is an accepted principle in coastal decision making. It requires decision makers to act having regard to the best available science, knowledge and understanding of the consequences of decisions and in the context of increasing uncertainty, to make decisions that minimise adverse impacts on current and future generations and the environment.

- (12) Clause 15.08-2 of the SPPF provides that one of the strategies for managing coastal hazards and the coastal impacts of climate change is:

286 at page 9
287 at page 36
288 at page 37

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

- (13) The most significant Victorian case on the application of the principle in the context of coastal planning is *Gippsland Coastal Board v South Gippsland Shire Council*²⁸⁹.
- (14) In this case, the Tribunal upheld an application to review the South Gippsland Shire Council's decision to grant planning permits for the development of dwellings in a coastal area. The Tribunal held that the risk of sea level rise and coastal hazards was a relevant consideration. It based its decision on this issue on section 60(1)(e) of the *Planning and Environment Act 1987* (Vic) and an application of the precautionary principle.
- (15) The applicant had urged the Tribunal to take a 'precautionary approach'. The Tribunal took this to be a reference to the precautionary principle²⁹⁰.
- (16) The Tribunal went on to note that the principle is included in the Inter-Governmental Agreement on the Environment, which forms part of the framework for decision making concerning the environment pursuant to clause 11.03-2 of the SPPF.
- (17) The Tribunal stated:

The precautionary principle requires, amongst other matters, a gauging of the consequences and extent of intergenerational liability arising from a development or proposal and if found to be warranted, appropriate courses of action to be adopted to manage severe or irreversible harm.

We accept that there is growing evidence of sea level rises and risks of coastal inundation. While we acknowledge that there is uncertainty as to the magnitude of the sea level rise, it is evident that the consequences of such rises in level will be complex due

289 [2008] VCAT 1545
290 at [41]

to the dynamic nature of the coastal environment...In the face of such evidence, a course of action is warranted to prevent irreversible or serve harm²⁹¹.

...

In the present case we have applied the precautionary principle. We consider that increases in the severity of storm events coupled with rising sea levels creates a reasonably foreseeable risk of inundation of the subject land and the proposed dwellings, which is unacceptable²⁹².

- (18) Since the *Gippsland Coastal Board* case, the Tribunal has relied on the precautionary principle (as well as relevant State policy) to order that coastal hazard vulnerability assessments be carried out for coastal developments²⁹³.
- (19) Courts in other jurisdictions have also referred to the precautionary principle in cases involving coastal climate change issues.
- (20) For example, *Walker v Minister for Planning*²⁹⁴ involved a challenge to the Minister for Planning's approval of a concept plan for the subdivision and residential development of coastal land in Sandon Point on the Illawara coast of NSW. The applicant argued that the Minister had approved the plan without considering the impacts of climate change on the proposed development.
- (21) Biscoe J in the New South Wales Land and Environment Court held that the subject matter, scope and purpose of the *Environment Planning and Assessment Act 1979* (NSW) required the Minister to consider the Director-General's Report and recommendations when approving a concept plan.

291 at [41] – [42]

292 at [48]

293 For example: *Myers v South Gippsland Shire Council* [2009] VCAT 1022 and *Ronchi & Anor v Wellington SC* [2009] VCAT 1206

294 [2007] NSWLEC 741. On appeal, *Minister for Planning v Walker* (2008) NSWCA 224

- (22) Clause 8B of the *Environmental Planning and Assessment Regulation 2000* (NSW) requires the Director-General to include in the Director-General's Report 'any aspect of the public interest that the Director-General considers relevant to the project'. His Honour held that clause 8B therefore requires the Director-General to form an opinion as to what aspects of ESD (if any) are relevant to the project, and then include those in the Director-General's Report.
- (23) His Honour then held that by implication from the subject matter, scope and purpose of the Act, the Minister was bound to consider climate change and flood risks associated with the project.
- (24) The New South Wales Court of Appeal²⁹⁵ reversed Biscoe J's decision, but upheld some of his reasoning.
- (25) Hodgson JA (with whom Campbell and Bell JJA agreed) agreed that the minister was required to consider the 'public interest' when exercising his powers under the Act, and that the principles of ESD (which included the precautionary principle and inter-generational equity) were *now* elements of the public interest.
- (26) His Honour agreed with Biscoe J that consideration of ESD principles (including the precautionary principle) in relation to this project would have required consideration of long-term threats of serious or irreversible environmental damage, not inhibited by lack of full scientific certainty, and that this almost inevitably would have involved consideration of the effect of climate change flood risk.
- (27) However, his Honour considered that at the time the Minister made his decision (some years before the case was heard) ESD principles were *not* elements of the public interest. Therefore, the Minister's decision could not be avoided on that basis.

295 *Minister for Planning v Walker* [2008] NSWCA 224

- (28) In *Aldous v Greater Taree City Council*²⁹⁶, the applicant challenged the validity of a development approval granted by the Greater Taree City Council for the construction of a dwelling on a beachfront property. One of the grounds of the appeal was that the Council had failed to take into account the principles of ESD, including the principles of intergenerational equity and the precautionary principle. More particularly, the applicant contended that the Council failed to take into account or assess climate change induced coastal erosion.
- (29) However, in this case Biscoe J did not accept the applicant's argument. His Honour considered that the Council took the issue of coastal erosion and its inducement by climate change into account when it made its decision. This was evidenced by, among other things, the steps taken to prepare a coastal zone management plan for the area and the briefing of a consultant to prepare the necessary study.

13.4 Conclusion

- (1) The precautionary principle, as defined in the Rio Declaration, refers to the need to take measures to prevent *environmental degradation*.
- (2) A development in a coastal area may have the effect of worsening climate change (for example, by causing the emission of greenhouse gases) and/or worsening the effects of climate change (for example, by increasing coastal erosion).
- (3) When making decisions about such a development, decision makers should apply the precautionary principle. If the principle is applied, any lack of scientific certainty regarding the impact of the development cannot be used as a reason for postponing measures to prevent the environmental degradation that may be caused by the development.
- (4) Development in coastal areas which may be the subject of inundation as a result of rising sea levels may also cause economic loss (eg costs associated with the damage or destruction of infrastructure, and the

296 [2009] NSWLEC 17

construction of sea walls) and social harm (eg the displacement of persons). Unless an extremely wide definition of 'environment' is adopted which includes economic and social harm, it is arguable that relying on the precautionary principle (as opposed to simply a precautionary approach) is not the appropriate mechanism to regulate development to prevent this kind of loss.

- (5) While the Tribunal in the *Gippsland Coastal Board* case purported to apply the precautionary principle as a basis for its decision to prohibit a development on the coast that was likely to be affected by coastal hazards, there was no discussion in the decision as to the *environmental degradation* that was being addressed. Whilst a precautionary approach was certainly prudent in this case in determining whether to adopt climate change science, this is arguably different to applying the precautionary principle, which specifically deals with avoiding damage to the environment.
- (6) What is clear from cases such as *Gippsland Coastal Board v South Gippsland Shire Council*, *Walker v Minister for Planning* and *Gray v Minister for Planning* is that relevant Tribunals and Courts have accepted climate change science and have adopted a precautionary approach when assessing planning applications.

14. Charter of Human Rights and Impact on Climate Change Planning

- (1) The *Charter of Human Rights and Responsibilities Act 2006 (Charter)* commenced operation on 1 January 2007 and became fully operative on 1 January 2008.
- (2) The Charter may have an impact on a range of decisions made by the DPCD and local Councils in relation to climate change planning.

14.2 What are the human rights protected?

- (1) The Charter aims to protect 20 civil and political rights which are derived from the International Covenant on Civil and Political Rights.
- (2) These human rights can be remembered using the acronym FREDA:
 - (a) **Freedom** Movement, assembly and association, expressions, religion and belief, liberty, fair hearing
 - (b) **Respect** Life, protection of families, cultural rights
 - (c) **Equality** Non-discrimination, equal recognition
 - (d) **Dignity** Torture and cruel treatment, privacy and reputation, humane treatment in detention
 - (e) **Autonomy** Taking part in public life

14.3 What does the Charter mean for planning and development decisions of DPCD and Councils?

- (1) The Charter:
 - (a) creates a positive obligation on public authorities, including municipal Councils, to give “proper consideration” to human rights in “decision making processes”; and

- (b) imposes a duty on public authorities to “act” compatibly with human rights (see section 38(1)).
- (2) The Charter makes it unlawful for a public authority to act in a way that is incompatible with a human right, or in making a decision, to fail to give proper consideration to a relevant human right.
- (3) An “act” is defined in the Charter to include not just a positive act, but also a failure to act and a proposal to act (section 3).
- (4) Procedurally, a public authority must give proper consideration to human rights in their decision making processes.
- (5) The term “making a decision” is not defined in the Charter, however, it is our view that it could encompass the following decisions related to coastal climate change planning issues:
 - (a) decisions regarding planning scheme amendments, for example prevention of inappropriate developments in vulnerable areas or scheme management mechanisms dealing with erosion or inundation (see Amendment C58 Hobsons Bay Planning Scheme - Panel Report);
 - (b) decisions to compulsorily acquire land to provide a buffer against the effects of climate change on the coastal environment; and
 - (c) decisions to manage areas subject to erosion, inundation and other coastal hazard risks, such as the imposition of hard protection structures.
- (6) The Charter could also encompass more general decisions, including the following:
 - (a) decisions regarding permit applications from application to review (See *Carwoode v Cardinia* overleaf); and
 - (b) decisions of an administrative nature such as hiring employees and contractors, entering into general contracts, entering into contracts for the sale and purchase of land.

- (7) What is “proper consideration” has been held by courts to mean that more than just cursory assessment is required.
- (8) We note that at least four of the “human rights” referred to in the Charter should be noted by Councils as being a potential issue. These are:
- (9) Right to privacy (section 13). This human right is expressed in terms that every person has the right not to have his or her privacy, family, home, or correspondence unlawfully or arbitrarily interfered with. An example may be imposing management measures in vulnerable areas on a person’s property.
- (10) A decision to interfere with a person’s home will not be unlawful if it is made in accordance with legislation. However, the term “arbitrary” requires that the interference is reasonable in the particular circumstances.²⁹⁷
- (a) *Freedom of opinion and expression* (section 15). This human right includes that every person has the right to freedom of expression “in any medium chosen by him or her”. This could include expression by house design. However, this right is not absolute and in a particular case, the right may be subject to lawful restriction reasonably necessary for the protection of national security, public order, public interest or public health. Arguably, these restrictions may be broad enough to allow Council decisions refusing inappropriate building designs in vulnerable areas.
- (b) *Taking part in public life* (section 18). This human right provides that every person in Victoria has the right, and is to have the opportunity, to participate in the conduct of public affairs directly or through freely chosen representatives. While not entirely clear, from a Council perspective, meetings that take place in confidence that affect the public may need to consider this right in future.

²⁹⁷ *Kracke v Mental Health Review Board & Others (General)* (2009) VCAT 246 (at para 169); *McInnes v Vicroads (General)* [2009] VCAT 2342 (at para 24).

- (c) *Property rights* (section 20). This section states that “A person must not be deprived of his or her property other than in accordance with law”. This human right may impact on compulsory acquisition of land. Section 20 does not provide for or recognise a right to just compensation upon the compulsory acquisition of land.²⁹⁸

14.4 Breach of the Charter

- (1) Specifically, section 38 of the Charter provides that, “it is unlawful for a public authority to act in a way that is incompatible with a human right or, in making a decision, to fail to give proper consideration to a relevant human right”.
- (2) Such an action or decision will not be unlawful where the public authority “could not reasonably have acted differently or made a different decision” in accordance with the legislation (s.38(2)). This exemption may apply to procedures or processes set out in legislation, but is unlikely to apply where the legislation provides discretion to a public authority.
- (3) While the terms of the Charter refer to “unlawful” actions in section 38, there is no penalty or damages available for an established breach. In other words, a breach of the Charter does not of itself give rise to an independent cause of action.
- (4) However, while the Charter does not create an automatic right of review, the wording of section 39 of the Charter suggests that where a person has a right of review arising from an unlawful act or decision of a public authority, then any unlawfulness arising from a breach of the Charter could be used as a ground in those proceedings.
- (5) For example declaratory actions under section 149B of the *Planning and Environment Act 1987*, or potentially, even as grounds under a planning merits review, although it is unclear whether a case will be decided in a merits review based solely on the unlawful action of Council in failing to

²⁹⁸ *Halwood Corporation (in Liq) v Road Corp* [2008] VSC 28 at para 108.

give proper consideration to the Charter. As planners and lawyers we will have to wait and see how this area of law develops.

- (6) Further, an act that may not have been unlawful but for the Charter, may become unlawful (eg ultra vires) if the lawful act, was incompatible with a human right, as the Charter requires that a public authority act compatibly with human rights. The outcome of which could be a determination that the decision was beyond the power of public authority and the public authority will be required to reconsider the decision taking into account the Charter.
- (7) The decision of VCAT in *Carwoode Pty Ltd v Cardinia SC* (Red Dot) [2008] VCAT 1334 is the first decision of the Tribunal to consider the Charter.
- (8) The review related to the failure of a responsible authority to make a decision on a planning permit within the statutory time period for the construction of two freeway service centres at Officer.
- (9) The Tribunal considered the Charter in the context of claims that parties to the proceedings had not been afforded natural justice and that there had been a breach of the right to a fair hearing. The Tribunal considered that the Charter applied to its decision-making as it was acting in an administrative capacity in considering the review (see *Carwoode v Cardinia* at 221).
- (10) The decision also referred to the ability of the Tribunal to consider case law from other jurisdictions in accordance with section 32(2).
- (11) In considering an amendment to rezone land and issue a permit to allow for the construction of a new Mosque in Newport, the Panel, hearing Planning Scheme Amendment C58 to the Hobsons Bay Planning Scheme, specifically referred to the Charter. In paragraph 1.3 of the Panel Report, the Panel stated “Our consideration of the (sic) both the Amendment and the Application recognises the human rights protected by the Charter of Human Rights and Responsibilities and takes into account the obligations placed on public authorities”. One of the matters the Panel considered in endorsing the proposal was the rights to freedom

of religion, communal religious observance and cultural rights as specified in the Charter.

(12) Some examples of where human rights in charters have been considered elsewhere include:

(a) Land acquisition for a public purpose - right to private life

(i) In the case of *Sole v Secretary State for Trade and Industry and Ors* [2007] EWHC 1527 (Admin) (30 May 2007) the UK High Court considered the case of compulsory acquisition of land in relation to proposed developments associated with the London Olympic Games.

(ii) The planning approval for the land acquisition required a relocation strategy for residents to be approved before development commenced. A draft strategy was submitted but not approved. The claimant's case was that the failure to provide an effective relocation strategy had resulted in interference with his right to private life, family, home and correspondence.

(iii) The High Court found that the interference was justified and proportionate in view of the widespread public benefits, together with an absence of alternate means to achieve those benefits.

(b) Nuisance from wind turbines - right to privacy and the right to protection of property

(i) In the case of *Fagerskiold v Sweden* [2008] ECHR 37664/04 (25 March 2008) the European Court of Human Rights considered a case regarding noise and light interference from wind turbines, in terms of the right to privacy and the right to protection of property under the European Charter of Human Rights.

- (ii) The European Court considered that the right to privacy can include nuisance, but the nuisance must be sufficiently severe to establish a breach of the right.
- (iii) While the Court accepted that the applicants were affected by the wind turbines, it determined that the nuisance was not severe enough to establish a breach of that right and that the impacts alleged had not been proven.
- (iv) The Court did not discuss what would amount to severe nuisance and therefore a breach of privacy and this will need to be considered on a case by case basis.

14.5 **Conclusion**

While general in nature, the Charter will have an impact on public authorities' decisions regarding climate change planning issues. While there have been very few cases in Victoria that have considered the impact of the Charter on planning and environment decision making, a body of authority relating to the application of the principles in other fields is emerging. Attached to this report is a summary of the cases in which the principles have been applied. It is recommended that in making any decision, the public authority notes the words in section 38 of the Charter, and gives proper consideration to the relevant human right, if any, that may be impacted by its decision. The summary of the relevant cases is contained at Appendix 3.

APPENDIX 1: Summary of LPPF Objectives and strategies relevant to Coastal Climate Change Planning Issues

Planning Scheme	Clause	Relevance to Coastal Climate Change Planning Issues
Glenelg	21.04	Identifies coastal dune erosion as a major force / trend that impacts on the Glenelg Shire
	21.09	Identifies the need to prevent inappropriate development in coastal areas that is likely to prejudice the long term environmental values of the coast.
	22.01-5	Identifies an area (Dutton Way) that has been subject to major coastal erosion. Requires all proposals for use and development to be subject to strict evaluation in terms of their impact on erosion.
	22.02-4	Recognises the susceptibility of the coast to the effects of natural events, including sea-level rise. It is policy pursuant to this Clause that care will be taken to minimise, or where possible totally avoid, any impact on environmentally sensitive areas from the expansion of urban and residential areas, including the provision of infrastructure for urban and residential areas.
Moyne	21.03	Identifies the need for clear directions regarding the future use and development of the coast as being a factor influencing future planning and development in the Shire
	21.06	Specifies that development in coastal areas must occur in a sensitive manner that does not impact upon the environmental significance and sensitivity of the coast. Also acknowledges that there is a need to develop a greater understanding of coastal processes in order to protect the coastal attributes present in the Shire.

	21.07	Identifies the sustainable management of the Shire's coastal resources, including the identification and protection of significant environmental features and the need for clear directions regarding the future use and development of the coast, as a key strategic issue. Strategies to address this issue will be implemented through (amongst other matters): <ul style="list-style-type: none"> - compliance with the Victorian Coastal Strategy. - Ensuring coastal and river developments recognise the sensitive nature of these assets.
	22.01-3	Specifies that the coastline and coastal dunes around Port Fairy should be protected from inappropriate development.
	22.02-1	Specifies that it is policy to recognise the susceptibility of the coast to the effects of natural events, including sea-level rise.
Warrnambool	21.02	Identifies increasing pressure in coastal areas for new dwellings, tourism facilities and infrastructure as a key influence
	21.05-3	It is a strategy to protect coastal and river systems when considering any form of development. Within the Hopkins Point River and Coastal Environment, it is a strategy to require subdivisions to include buffer areas that afford effective protection of the environmental values of the coast and river environments from impacts such as (amongst other matters) climate change
	21.06-2	Specifies that it is policy to plan for coastal impacts associated with sea level rise and climate change.

	21.06-3	Specifies that it is a strategy that development on the coast and adjoining estuarine areas should be setback sufficiently to take into account the cumulative effects of the 1:100 year storm event, sea level rise associated with climate change.
	21.06-4	Supports the regional implementation of the Victorian Coastal Strategy
	21.07-3	It is a strategy to ensure that coastal and river development recognises the sensitive nature of these areas.
	22.01-3	Within the South Warrnambool Village Precinct it is policy that the design of the new development has regard to (amongst other matters) coastal conditions, and that design techniques and materials are adopted that are responsive to coastal conditions.
Corangamite	21.04-2	Council will co-ordinate with other land management authorities over the use and development of land, having regard to (amongst other matters) the Victorian Coastal Strategy.
	22.02-3	It is policy that preference is given to maintaining the environmental integrity of wetlands and protecting their foreshore, drainage, habitat, landscape, filtration and storage functions.
Colac Otway	21.01-6	Council is committed to give effect to (amongst other documents) the Victorian Coastal Strategy
	21.02-2	It is a key land use theme that development will respond to environmental risks such as (amongst others) erosion
	21.03-1	Council seeks to promote a pattern of settlements in the coastal strip that balances between opportunity for growth and retention of environmental and cultural qualities. Notes that expansion of some coastal settlements will be restricted in accordance with environmental constraints.

	21.03-3	In Apollo Bay and Marengo it is a strategy to avoid development in areas at risk from (amongst other matters) the effects of flooding and erosion
	21.04-7	Notes that the impact of climate change on land within Colac Otway Shire has been considered in a recent report (Climate Change in the Corangamite Region – DSE 2004) that addresses temperature, rainfall, drought, water resources, fire, winds, storms and sea level rise. Specifies that it is appropriate to apply the precautionary principle by ensuring that the land use and development considers the future impacts of climate change. On this basis it is an objective of Council to ensure that coastal planning considers and responds to the forecast impacts of climate change. Further, it is a strategy of Council to ensure use and development proposals take into account and respond adequately to future sea level rise and storm surge related to climate change.
	21.06	Council will take further action to investigate the land use planning implications of sea level rise and storm surge associated with climate change and appropriate planning scheme responses.
Surf Coast	21.04-1	Acknowledges problems of erosion and subsidence in coastal areas
	21.04-3	It is an objective to protect the coastal township character of the towns and the environmental and scenic values of the coast, by preventing urban expansion beyond existing town boundaries.

	21.05-3	<p>Identifies that the dynamic nature of the coast can present a public risk. Specifies that planning and management within and adjoining these areas must consider situations where there is a need to limit public and private use by relocating and restricting access, where appropriate.</p> <p>It is a strategy to ensure that development and use of land in coastal areas is consistent with any adopted Coastal Action Plan and where no adopted plan exists, with the Victorian Coastal Strategy.</p> <p>It is a strategy to ensure that decision making processes integrate coastal and catchment management objectives.</p> <p>It is a strategy to locate infrastructure away from significant environmental areas and the unstable coastal zone.</p> <p>Council proposes to investigate erosion issues in coastal areas and apply the Erosion Management Overlay where necessary.</p>
	21.08-2	It is a strategy to ensure that development and use in coastal areas is consistent with the Victorian Coastal Strategy
	22.01-3	In the RCZ in coastal areas, or where a SLO1 or 2 or DDO 1 or 2 applies it is policy that, where practical alternative locations exist, buildings should not be located in locations susceptible to erosion or inundation
Queenscliffe	21.05-1	<p>It is an objective to avoid inappropriate built development that compromises areas of acknowledged natural, built cultural or environmental sensitivity.</p> <p>It is an objective to ensure that new development takes account of known flooding and drainage issues.</p> <p>It is a strategy to evaluate the impact of development proposals on acknowledged environmental and urban character values with the aim of avoiding inappropriate uses and development</p>

	21.05-3	<p>It is an objective to protect the foreshore environment from inappropriate residential development and subdivision</p> <p>It is a strategy to limit the impact of residential developments on adjacent foreshore areas through the use of appropriate design standards</p>
	22.04-3	In the Swan Bay, Port Phillip Bay and Point Lonsdale Road Foreshore Areas, it is policy that the design of new development gives regard to (amongst other matters) any sensitivities associated with coastal environments.
Greater Geelong	21.05	It is a broad planning principle that areas of environmental sensitivity, including flora, fauna, wetlands and coastal areas, will be protected.
	21.08	It is a strategy to protect sites and areas of environmental sensitivity including flora, fauna, wetlands and coastal areas from urban development. This strategy is to be implemented by (amongst other matters) requiring development to take account of relevant local environmental considerations.
	21.11	Council proposes to introduce policies and procedures to ensure sustainable management of streambanks, riverbanks and wetland margins to minimise erosion and preserve and enhance habitat values.

	21.12	<p>Acknowledges that coastal inundation results in significant adverse economic, social and environmental impacts</p> <p>It is an objective to minimise the potential for significant public and private property damage and risks to the safety of the community resulting from flooding.</p> <p>It is a strategy to ensure that land use and development is compatible with flood prone land. This strategy will be implemented by considering the impacts of all use and development applications proposed in flood prone areas.</p> <p>Council proposes to pursue studies into extreme tide levels with the relevant authorities and, following these studies, review the application of the flooding zones and overlays accordingly.</p>
	21.13	<p>It is a strategy to locate/direct buildings and works in coastal areas away from dynamic coastal environments such as eroding cliffs or shorelines and areas potentially impacted by rising sea levels.</p> <p>It is a strategy to discourage the construction of additional structures on the foreshore except where substantial net benefits to the community and/or coastal environment are demonstrated.</p> <p>It is a strategy to undertake an assessment of beach erosion and determine appropriate measures for restoration and renourishment.</p> <p>These strategies will be implemented by (amongst other matters) requiring that primary and secondary sand dunes be protected from residential subdivision or use and development.</p> <p>Council proposes to identify and map areas of environmental significance along the coast and including this information on Council's Land Information System.</p>

	21.33	<p>Requires that development in Dysdale / Clifton Springs to take account of relevant local environmental considerations</p> <p>Notes that in Dysdale / Clifton Springs that there is little of ecological significance left on the coastal strip, however the cliffs are slip-prone, and every effort should be made to minimise erosion pressures.</p>
	21.34	<p>Acknowledges that the low lying nature of the Portarlington / Indented Head area will affect future growth if the predicted Greenhouse effect occurs. In particular, the low lying area of Point Richards and Salt Lake (near St Leonard's) may experience some change in the line of the coast.</p> <p>Requires that development in Portarlington / Indented Head takes account of relevant local environmental considerations including protection of sensitive coastal and wetland areas</p>
	22.03	<p>In Breamlea it is policy that indigenous vegetation should be retained when it is important in preventing erosion of the dunal system.</p>
Wyndham	21.05-6	<p>It is a strategy of Council to maximise open space opportunities along the creeks, waterways and coastal areas of the municipality, including trails and other links.</p>
	21.05-8	<p>It is Council's policy to seek to realise the potential for supporting land uses (such as a foreshore marina) near key tourism assets such as the coast.</p>
	21.12-2	<p>It is a strategy to ensure that existing living patterns and residential quality of life issues are enhanced by coastal developments.</p> <p>It is a strategy to Ensure that any development on land adjoining the coast, which could impact on the coast, is consistent with the Victorian Coastal Strategy.</p> <p>It is an objective to facilitate appropriate development within proximity to the coast. Council will use policy and the exercise of discretion to ensure development takes into account relevant coastal considerations.</p>

Hobsons Bay	21.12-2	<p>It is a strategy to give consideration to the marine environment in the assessment of any planning issues relating to the coast.</p> <p>It is a strategy to ensure that any development on land adjoining the coast, which could impact on the coast, is consistent with (amongst other matters) the Victorian Coastal Strategy.</p>
Port of Melbourne		<p>Specifies that the PoMC is committed to promote, assist and coordinate the use and development of the Port to cater for projected growth, in an environmentally sustainable manner for the benefit of present and future generations.</p>
Port Phillip	21.05-2	<p>It is an objective to achieve a sustainable balance between preserving the physical and environmental attributes of the foreshore, meeting the needs of users and minimising adverse amenity impacts on the local area.</p> <p>It is a strategy to ensure that new use and development on the foreshore reserve will not pose a threat to the sensitive natural environment.</p>
Bayside	21.04-2	<p>It is an overarching Goal for Council to be an ecologically focused city in which (amongst other matters) development is responsibly managed for the benefit of this and future generations.</p>
	21.11-3	<p>It is an objective to recognise the coast as a dynamic natural environment</p> <p>It is a strategy to protect the foreshore from inappropriate development that may undermine the character and amenity of the coastal reserve.</p>

Kingston	21.08-3	<p>It is an objective to protect and where possible, restore the integrity of natural ecosystems and coastal processes, and to minimise adverse environmental impacts on the coastal and marine environments.</p> <p>It is a strategy to develop land use management plans in partnership with DNRE and Parks Victoria for the protection and maintenance of the coastal environment in line with identified environmental objectives, which encompass issues related to (selected as relevant):</p> <ul style="list-style-type: none"> - Cliff stabilisation. - Refurbishment and/or removal of degraded foreshore structures. - Beach renourishment
Frankston	21.02	Notes that maintaining natural coastal processes is one of a number of overlapping aims that need to be achieved for the coast and foreshore.
	21.08-2	<p>Identifies as a key issue the impact of coastal processes and the potential Greenhouse effect and the need to consider those in land use decisions.</p> <p>Council will use policy and exercise discretion by considering the implications of coastal processes and potential greenhouse effects for development proposals.</p>
Mornington Peninsula	21.03-3	Identifies that coastal management is a core issue for the Peninsula and the relatively narrow coastal strip is the focus of multiple land use pressures. Sustainable use of the Peninsula's foreshores, offers major social, environmental and economic benefits but requires careful planning and coordination.

	21.08	<p>It is an objective to protect and enhance the natural ecosystems and landscapes of the coast for the benefit and enjoyment of present and future generations</p> <p>It is a strategy to acknowledge natural processes and the fragile and dynamic nature of the coast in decision making.</p> <p>It is a strategy to identify threatening processes (including erosion) that may impact on the foreshore's natural systems and sites and apply appropriate management techniques.</p> <p>Council will use policy and exercise discretion by:</p> <ul style="list-style-type: none"> - Applying a precautionary approach to decision making, ensuring that the environmental effects of both the construction and operation of a proposed development are assessed as part of the approval process. New development proposals should respect natural coastal systems and should include an assessment of vulnerability to climate change effects. - Approving private coastal protection works only where they will not: <ul style="list-style-type: none"> o Cause loss of or damage to public beaches, Crown land or significant natural features. o Result in erosion of adjacent properties. o Adversely affect on coastal landform stability or coastal processes.
French Island and Sandstone Island	21.06-3	It is a strategy to allow for use and development in coastal locations only if they are compatible with the sensitive nature of their surrounding environment and the capacity of the land.

Bass Coast	21.02-6	Specifically identifies that climate change is predicted to cause an increase in sea levels, a decrease in rainfall and more frequent and severe storm events. It is predicted that sea levels will rise by not less than 0.8 metre by the year 2050. As a result there is likely to be impacts on coastal settlements, biodiversity, infrastructure and agricultural production.
	21.03-3	Identifies as key issues: <ul style="list-style-type: none"> - The protection of areas subject to future impacts as a result of climate change as a key issue. - Seeking a balance between urban growth of coastal communities and planning for the effects of climate change.
	21.04-2	Part of Council's vision is development that is responsive to the effects of climate change.
	21.05-1	It is an objective to discourage urban development that encroaches or impacts on significant environmental features and in areas affected by future climate change impacts. Strategies specifically relevant to this objective include: <ul style="list-style-type: none"> - Ensure that urban growth and development enhances significant environmental features by identifying and protecting these areas during the preparation of Structure Plans. - Manage climate change impacts by: <ul style="list-style-type: none"> o Identifying areas subject to future impacts of climate change. o Preparing a strategy to deal with the possible impacts of climate change for developments located within existing urban boundaries. o Avoiding development in areas outside of town boundaries where there are possible

		<p>impacts as a result of climate change.</p> <ul style="list-style-type: none"> - Ensure that development is set back from the coast to accommodate coastal features, vegetation and climate change impacts.
	21.07-4	<p>This Clause specifically addresses climate change issues. It states:</p> <p>Climate change is predicted to cause an increase in sea levels, a decrease in rainfall and more frequent and severe storm events. It is predicted that sea levels will rise up to 0.8 metre by the year 2050 (Intergovernmental Panel on Climate Change Fourth Assessment Report: Synthesis Report, UNESCO, 2007).</p> <p>There will be impacts on coastal settlements, biodiversity, infrastructure and agricultural production. As Bass Coast Shire has a number of low lying regions (both on the coast and further inland), and a large amount of viable agricultural land, the future impacts of climate change on the municipality are significant planning issues.</p> <p>It is an objective to discourage development in areas that may be affected by climate change.</p> <p>Strategies specifically relevant to this objective include:</p> <ul style="list-style-type: none"> - Determine the effects of sea level rise and storm surges and prepare and implement strategies to address any potential issues. - Increase the Council and the community's knowledge and understanding of the effects of climate change in the municipality. - Discourage individual landowners adjacent to the coast from constructing their own sea wall barriers in an attempt to minimise impacts from erosion and coastal processes.

	21.13	<p>Council will undertake the following future strategic work:</p> <ul style="list-style-type: none"> - Work with the State government to undertake mapping that identifies areas subject to inundation as a result of sea level rise. - Prepare and implement a report that examines the impacts of climate change for the municipality.
South Gippsland	21.04-9	It is a strategy in Venus Bay to discourage development in areas susceptible to erosion.
Wellington	21.04	<p>It is a strategy to restrict population growth and urban development in environmentally sensitive parts of the Shire, such as coastal areas.</p> <p>It is a strategy to consider proposed major developments outside existing coastal centres only when a genuine need has been demonstrated and environmental capability adequately assessed to ensure minimal adverse impact.</p> <p>It is a strategy to strongly discourage new residential subdivision or development in sensitive or dynamic areas such as primary or secondary sand dunes, or on the Lake Reeve Islands.</p>
	21.05	It is a strategy to restrict development on flood plains and land liable to inundation
	21.06	It is a strategy to assess proposed sites for tourist developments along the coastline and lakes foreshore on the basis of their environmental capability and suitability.
	22.08	Along the Ninety Mile Beach between The Honeysuckles and Paradise Beach, it is policy to discourage any development in inappropriate subdivision areas that are subject to inundation and flooding. These area are defined and mapped under this Clause.

East Gippsland	21.05-3	It is a strategy to take into account the effects of anticipated climate change, including increased storm events and sea-level rise, in coastal planning.
	21.05-4	<p>It is a strategy to encourage developers of tourist and other commercially oriented coastal developments or enterprises to recognise, and minimise impacts on, sensitive coastal ecosystems and dynamic coastal processes by incorporating best practice management principles.</p> <p>It is strategy to manage development on flood prone land to reduce the likelihood of impeding or redirecting floodwaters and to protect against future claims for compensation for flood damage.</p>
	22.09	<p>It is an objective to ensure that urban and rural areas which are liable to inundation by overland flow, sheet flooding or land affected by the 1 in 100 year flood are identified and that land use and development in these areas are managed to reduce risks of damage to buildings and works, or of impeding flood flows and free passage of water.</p> <p>It is policy that in considering any application for use or development, including subdivision, Council shall have regard to the likelihood of the land being subject to erosion risk.</p> <p>It is policy that in considering any application for use or development, including subdivision, Council shall have regard to the likelihood of the land being flood prone.</p>

APPENDIX 2 Sources of technical information

Summary of sources of technical information in relation to Coastal Climate Change impacts

Key International organisations and their websites:

- (1) Intergovernmental panel on climate change
- (2) <http://www.ipcc.ch/>
- (3) United Nations Framework Convention on Climate Change
- (4) <http://unfccc.int/2860.php>

Key publications, International

- (5) The Copenhagen Diagnosis, 2009: Updating the World on the Latest Climate Science.
- (6) Allison, N.L. Bindoff, R.A. Bindschadler, P.M. Cox, N. de Noblet, M.H. England, J.E. Francis, N. Gruber, A.M. Haywood, D.J. Karoly, G. Kaser, C. Le Quéré, T.M. Lenton, M.E. Mann, B.I. McNeil, A.J. Pitman, S. Rahmstorf, E. Rignot, H.J. Schellnhuber, S.H. Schneider, S.C. Sherwood, R.C.J. Somerville, K. Steffen, E.J. Steig, M. Visbeck, A.J. Weaver. The University of New South Wales Climate Change Research Centre (CCRC), Sydney, Australia, 60pp. November 2009
http://www.ccrcc.unsw.edu.au/Copenhagen/Copenhagen_Diagnosis_HIGH.pdf
- (7) Synthesis Report – Climate Change, Global Risks, Challenges & Decisions COPENHAGEN 2009, 10-12 March
www.climatecongress.ku.dk
- (8) Katherine Richardson, Will Steffen, Hans Joachim Schellnhuber, Joseph Alcamo, Terry Barker, Daniel M. Kammen, Rik Leemans, Diana Liverman, Mohan Munasinghe, Balgis Osman-Elasha, Nicholas Stern, Ole Wæver <http://climatecongress.ku.dk/pdf/synthesisreport>

- (9) IPCC Fourth Assessment Report (AR4) - Climate Change 2007: Synthesis Report, Contribution of Working Groups I, II and III to the Fourth Assessment Report of the Intergovernmental Panel on Climate Change - Core Writing Team, Pachauri, R.K. and Reisinger, A. (Eds.). IPCC, Geneva, Switzerland. pp 104
http://www.ipcc.ch/publications_and_data/publications_ipcc_fourth_assessment_report_synthesis_report.htm

Key National organisations and their websites

- (10) Australian Government Department of Climate Change
<http://www.climatechange.gov.au/default.aspx>
- (11) CSIRO
<http://www.csiro.au/>
- (12) Oceans and Coasts section
<http://www.csiro.au/science/Oceans.html>
- (13) National Research Flagship - Climate Change Adaptation
<http://www.csiro.au/org/ClimateAdaptationFlagship.html>
- (14) Australian Government – Geoscience Australia
<http://www.ga.gov.au/>
- (15) Ozcoasts – Australian Online Coastal Information (including Landform & Stability module incorporating the “Smartline” geomorphological maps and coastline conceptual models)
<http://www.ozcoasts.org.au/index.jsp>
- (16) University of New South Wales Climate Change Research Centre, The Copenhagen Diagnosis organisation
<http://www.copenhagendiagnosis.org/default.html>

Key publications, National

- (17) Australian Government, Department of Climate Change - Climate Change Risks to Australia's Coast - A FIRST PASS NATIONAL ASSESSMENT
- <http://www.climatechange.gov.au/en/publications/coastline/climate-change-risks-to-australias-coasts.aspx>
- (18) The Parliament of the Commonwealth of Australia Standing Committee on Climate Change, Water, Environment and the Arts - Inquiry into climate change and environmental impacts on coastal communities - Managing our coastal zone in a changing climate - The time to act is now. House of Representatives, October 2009:
- <http://www.aph.gov.au/house/committee/ccwea/coastalzone/report/Final%20Report.pdf>
- (19) Australian Government Department of Climate Change - Climate Change 2009: Faster Change and More Serious Risks. Steffen.W, 2009
- <http://www.anu.edu.au/climatechange/wp-content/uploads/2009/07/climate-change-faster-change-and-more-serious-risks-final.pdf>
- (20) The Garnaut Climate Change Review
- <http://www.garnautreview.org.au/index.htm>
- (21) COAG National Climate Change Adaptation Framework
- http://www.coag.gov.au/coag_meeting_outcomes/2007-04-13/docs/national_climate_change_adaption_framework.pdf
- (22) Variability and trends in the Australian wave climate and consequent coastal vulnerability. CSIRO - M. A. Hemer¹, K. McInnes¹, J. A. Church¹, J. O'Grady¹, & J. R. Hunter². 9 September 2008
- <http://www.climatechange.gov.au/~media/publications/coastline/wave-climate.ashx>

Key Victorian organisations and their websites (including peak industry bodies, alliances and associations)

- (23) Victorian Government - Department of Sustainability and Environment (DSE)
<http://www.dse.vic.gov.au/dse/index.htm>
- (24) Coasts and Marine Section:
<http://www.dse.vic.gov.au/dse/nrencm.nsf/Home+Page/DSE+Coasts~Home+Page?open>
- (25) Victorian Government - Department of Planning and Community Development (DPCD)
<http://www.dvc.vic.gov.au/Web14/dvc/dvcmain.nsf>
- (26) Coastal Planning Section
<http://www.dse.vic.gov.au/DSE/nrenpl.nsf/LinkView/9237AC17626E8D9ACA2572C6001E86EBEF546347BB845D44CA2572DA007FE2BE>
- (27) Victorian Government - Climate Change Website
<http://www.climatechange.vic.gov.au/index.html>
- (28) Victorian Government - Future Coasts Program (DSE and DPCD)
<http://www.climatechange.vic.gov.au/Greenhouse/wcmn302.nsf/childdocs/-0A075FE0F68F56D6CA2575C40007BF74-A2C8013E5CEDE429CA25766D0016E286?open>
- (29) Victorian Coastal Council
<http://www.vcc.vic.gov.au/index.htm>
- (30) Gippsland Coastal Board (climate change section of website)
<http://www.gcb.vic.gov.au/>

- (31) Central Coastal Board
<http://www.ccb.vic.gov.au/>
- (32) Western Coastal Board
<http://www.wcb.vic.gov.au/>
- (33) Victorian Planning and Environmental Law Association
<http://vpela.org.au/>
- (34) South East Councils Climate Change Alliance
<http://www.wpga.org.au/default.asp>
- (35) Association of Bayside Municipalities
<http://www.abmonline.asn.au/index.cfm>
- (36) Planning Institute of Australia (Victoria)
<http://www.planning.org.au/vic/>
- (37) Regional Development Victoria
<http://www.business.vic.gov.au/BUSVIC/LANDING/SEC12.html>
- (38) Urban Development Industry Association
<http://www.udivic.com.au/>
- (39) Municipal Association of Victoria
<http://www.mav.asn.au/CA256C2B000B597A/HomePage?ReadForm&1=Home~&2=~&3=~>
- (40) Mornington Biosphere Reserve
<http://www.biosphere.org.au/>

- (41) South West Sustainability Partnership
<http://www.southwestsustainability.org.au/index.php>
- (42) Glenelg-Hopkins Catchment Management Authority
<http://www.glenelg-hopkins.vic.gov.au/>
- (43) Corangamite Catchment Management Authority
<http://www.ccma.vic.gov.au/index.htm>
- (44) Port Phillip and Westernport Catchment Management Authority
<http://www.ppwcm.vic.gov.au/>
- (45) West Gippsland Catchment Management Authority
<http://www.wgcma.vic.gov.au/>
- (46) East Gippsland Catchment Management Authority
<http://www.egcma.com.au/>

Local Ports

- (47) Gippsland Ports
<http://www.gippslandports.vic.gov.au/index.php>
- (48) Port Phillip, Westernport and Port Campbell Local Ports (Managed by Parks Victoria)
<http://www.parkweb.vic.gov.au/1boat.cfm>
- (49) Port Fairy (Managed by Moyne Shire Council)
<http://www.moyne.vic.gov.au/>
- (50) Apollo Bay (Managed by Colac-Otway Shire Council)
<http://www.colacotway.vic.gov.au/>

- (51) Warrnambool (Managed by Warrnambool City Council)
<http://www.warrnambool.vic.gov.au/>
- (52) Lorne (Managed by Great Ocean Road Coast Committee)
<http://www.gorcc.com.au/>
- (53) Barwon Heads (Managed by Barwon Coast Committee of Management)
<http://www.barwoncoast.com.au/>

Commercial Ports

- (54) Port of Melbourne
<http://www.portofmelbourne.com/>
- (55) Geelong Port
<http://www.geelongport.com.au/>
- (56) Port of Hastings
http://www.portofhastings.vic.gov.au/html/s01_home/home.asp?dsb=352
- (57) Port of Portland
<http://www.portofportland.com.au/>

Note that there are also numerous other relevant or interested stakeholder groups and organisations including coastal management committees, community organisations, environmental and political organisations and other interest groups.

Key publications, Victoria

- (58) Victorian Coastal Strategy 2008
- <http://www.climatechange.vic.gov.au/Greenhouse/wcmn302.nsf/childdocs/-0A075FE0F68F56D6CA2575C40007BF74-A2C8013E5CEDE429CA25766D0016E286-3952C46986CC4CF5CA25766D0002013D?open>
- (59) CSIRO National Research Flagship Climate Change Adaptation
- (a) The Effect of Climate Change on Extreme Sea Levels along Victoria's Coast
- (b) A Project Undertaken for the Department of Sustainability and Environment, Victoria as part of the 'Future Coasts' Program
- (c) Kathleen L. McInnes, Ian Macadam and Julian O'Grady, November 2009
- (60) (Available from Future Coasts – Reports and Publications):
- <http://www.climatechange.vic.gov.au/Greenhouse/wcmn302.nsf/childdocs/-0A075FE0F68F56D6CA2575C40007BF74-A2C8013E5CEDE429CA25766D0016E286-3952C46986CC4CF5CA25766D0002013D?open>
- (61) CSIRO National Research Flagship Climate Change Adaptation
- The Effect of Climate Change on Extreme Sea Levels in Port Phillip Bay
- A Project Undertaken for the Department of Sustainability and Environment, Victoria
- Kathleen L. McInnes, Julian O'Grady and Ian Macadam
- CSIRO Marine and Atmospheric Research, November 2009

<http://www.climatechange.vic.gov.au/Greenhouse/wcmn302.nsf/childdocs/-0A075FE0F68F56D6CA2575C40007BF74-A2C8013E5CEDE429CA25766D0016E286-3952C46986CC4CF5CA25766D0002013D?open>

(62) Future Coasts – Reports and Publications:

<http://www.climatechange.vic.gov.au/Greenhouse/wcmn302.nsf/childdocs/-0A075FE0F68F56D6CA2575C40007BF74-A2C8013E5CEDE429CA25766D0016E286-3952C46986CC4CF5CA25766D0002013D?open>

(63) Planning and Environment Act 1987 Section 12 (2) (a)

Ministers Direction No. 13 - Managing coastal hazards and the coastal impacts of climate change

[http://www.dse.vic.gov.au/CA256F310024B628/0/0A2846AB3ABAA502CA25752100213E84/\\$File/dir13.pdf](http://www.dse.vic.gov.au/CA256F310024B628/0/0A2846AB3ABAA502CA25752100213E84/$File/dir13.pdf)

(64) Victorian Climate Change Green Paper - Published by the Victorian Government Department of Premier and Cabinet, Melbourne, June 2009.

[http://www.climatechange.vic.gov.au/CA256F310024B628/0/28321D94532B1FA7CA2575CA00112B3B/\\$File/Climate+Change+Green+Paper.pdf](http://www.climatechange.vic.gov.au/CA256F310024B628/0/28321D94532B1FA7CA2575CA00112B3B/$File/Climate+Change+Green+Paper.pdf)

Sectoral and Regional Vulnerabilities to Climate Change in Victoria

- (65) CSIRO National Research Flagships - Roger Jones, Leanne Webb - January 2008

<http://search.land.vic.gov.au/dse/cs.html?url=http%3A//www.climatechange.vic.gov.au/CA256F310024B628/0/33B64FC09A2A5C24CA2575D0001F95CF/%24File/CSIRO%2BVulnerabilities%2BReport%2BCSIRO%2B2008%2BPart%2BA.pdf&charset=iso-8859-1&qt=CSIRO&col=cc&n=2&la=en>

- (66) General Practice Note 2008 - Managing coastal hazards and the coastal impacts of climate change, Victorian Government Department of Planning and Community Development, December 2008.

[http://www.dse.vic.gov.au/CA256F310024B628/0/C8E4B30AF0572956CA257522002A2BD2/\\$File/Coastal+hazards+and+climate+change.pdf](http://www.dse.vic.gov.au/CA256F310024B628/0/C8E4B30AF0572956CA257522002A2BD2/$File/Coastal+hazards+and+climate+change.pdf)

- (67) Coastal Spaces Recommendations – DSE April 2006 (in partnership with Victorian Coastal Council)

[http://www.dse.vic.gov.au/CA256F310024B628/0/406D79092E8A4549CA25715400056C81/\\$File/Coastal+Spaces+Recommendations+Report.pdf](http://www.dse.vic.gov.au/CA256F310024B628/0/406D79092E8A4549CA25715400056C81/$File/Coastal+Spaces+Recommendations+Report.pdf)

- (68) Coastal planning fact sheet - Managing coastal hazards and the coastal impacts of climate change – DSE 2008

[http://www.dse.vic.gov.au/CA256F310024B628/0/C8E4B30AF0572956CA257522002A2BD2/\\$File/Coastal+hazards+and+climate+change.pdf](http://www.dse.vic.gov.au/CA256F310024B628/0/C8E4B30AF0572956CA257522002A2BD2/$File/Coastal+hazards+and+climate+change.pdf)

- (69) DSE Advisory Note – How to consider a sea level rise along the Victorian Coast

<http://www.dse.vic.gov.au/DSE/nrencm.nsf/LinkView/5CAE2103CCA154A8CA25751B0001A40592CD71AF8C1AF2E74A2567CA00817767>

- (70) DSE Fact Sheet: Future Coasts, Preparing Victoria's coast for climate change

[http://www.climatechange.vic.gov.au/CA256F310024B628/0/428DE4032AB41CAECA25755800819FC7/\\$File/Future+Coasts+Special+Bulletin+Feb+2009.pdf](http://www.climatechange.vic.gov.au/CA256F310024B628/0/428DE4032AB41CAECA25755800819FC7/$File/Future+Coasts+Special+Bulletin+Feb+2009.pdf)

- (71) DSE Fact Sheet: Updates in Climate Change Science - Recent climate change science, September 2009

[http://www.climatechange.vic.gov.au/CA256F310024B628/0/7432A4D10C74D0E4CA25763700773D1E/\\$File/Climate+Change+Science+Sept+2009+pdf.pdf](http://www.climatechange.vic.gov.au/CA256F310024B628/0/7432A4D10C74D0E4CA25763700773D1E/$File/Climate+Change+Science+Sept+2009+pdf.pdf)

APPENDIX 3 Victorian Charter of Human Rights and Responsibilities Act 2006 - Cases relating to “Public Authorities” under the Charter

Case	<i>Metro West v Sudi (Residential Tenancies)</i> [2009] VCAT 2025 (9 October 2009)
Forum	VCAT Residential Tenancies List
Issues	Whether a Social Housing Provider is a public authority and exercising powers of a public nature.
Decision	When providing transitional housing under a service agreement w/ Secretary to DHS, Metro West is a public authority under the Charter. <ul style="list-style-type: none"> - It was exercising a public function as it was providing social housing for vulnerable and disadvantaged people; - It was part of government policy and is government funded.
Quotes	The responsibility for respecting human rights is placed on public authorities. Their actions and decisions are unlawful when incompatible with human rights, subject only to contrary legislation.[187] Therefore the concept of a public authority is of fundamental importance to the achievement of the central purpose of the Charter. As with the comparable legislation in the United Kingdom[188] and New Zealand,[189] the definition of ‘public authority’ in s 4 must be given a wide and generous interpretation which is consistent with that purpose.

	<p>The definition does not require the public functions to have been acquired in any particular manner.^[195] Consistently with the purposes of the Charter and the underlying rationale of the definition of a functional public authority, this question is approached as a matter of substance and not form or legal technicality. If, as a matter of fact and fair characterisation, the functions of the entity 'are or include functions of a public nature', then it is a public authority when exercising them on behalf of the state or a public authority. The entity could acquire the functions by statute (as mentioned in s 4(2)(a)), contract (as mentioned in s 4(1)(c)), informal arrangement, voluntary acceptance, lawful imposition or, as s 4(1)(c) itself says, 'otherwise'.</p> <p>In the application of the definition of a functional public authority in s 4(1)(c), there is no universal test and every case must be considered on its own facts and merits.^[196] The focus of the definition is on matters of substance, not form and legal technicalities. Consistently with the wide and generous interpretation required of s 4(1)(c), the guiding factors in s 4(2)-(5) are not prescriptive and other factors may be relevant.^[197] Nonetheless, a private entity whose functions do not fairly answer the description in s 4(1)(c) is not bound to observe the Charter.</p> <p>As with the legislation in the United Kingdom,^[198] and in contrast to that in Canada,^[199] the phrase used in s 4(1)(c) is public function, not governmental function. Nor, in reference to the function, does it use the term statutory. The Charter encompasses a broader range of functions than those which might be identified as governmental or which are statutory.</p>

Case	<i>Lifestyle Communities Ltd (No 3) (Anti-Discrimination) [2009] VCAT 1869</i>
Forum	VCAT Anti-Discrimination List
Issues	Whether exemptions under s 83 of the Equal Opportunity Act to provide accommodation for people aged over 50 years was consistent with the Charter of Human Rights and Responsibilities Act 2006 , ss 7(2) and 8(3) and (4).
Decision	Justice Bell followed his decision in <i>Kracke</i> . VCAT is a tribunal acting in an administrative capacity and is therefore a public authority and bound by the Charter. Therefore it needed to interpret s 83 of the <i>Equal Opportunity Act</i> consistently with Human Rights. “Under the Charter, the applicant for exemption must establish the purpose by positive proof.” Lifestyle group were not entitled to discriminate against people under the age of 50 as they did not show why this discriminatory activity was justified.
Quotes	When a person obtains an exemption, they can engage in activity which would otherwise constitute prohibited discrimination. Following the enactment of the Charter of Human Rights and Responsibilities Act 2006, the discretion of the tribunal to grant an exemption must be exercised compatibly with human rights. This requires the exemption to be either a measure for assisting people disadvantaged by discrimination (s 8(4)) or for activities which limit human rights reasonably and no more than is demonstrably justified in a free and democratic society (s 7(2)).

Case	<i>Smeaton v Victorian WorkCover Authority (General)</i> [2009] VCAT 1195
Forum	VCAT General List
Issues	Whether a transfer of a Freedom of information request to Ombudsman engaged the Charter of Human Rights and Responsibilities Act 2006 , ss 15(1), 24(1) and 38(1).
Decision	The tribunal was a public authority and was bound to review the decision compatibly with the Charter. However, the relevant Charter issue was “freedom of expression” and this right was not engaged by the Freedom of Information Act. Therefore, the tribunal did not have jurisdiction to review the decision of the respondent to transfer the applicant’s request for access to documents to the Ombudsman pursuant to s 18 of the Freedom of Information Act 1982.

Case	<i>Hobsons Bay City Council & Anor (Anti-Discrimination Exemption) [2009] VCAT 1198</i>
Forum	VCAT Anti-Discrimination List
Issues	Application under Equal Opportunity Act 1995 s83 for exemption so use of pool area at Council leisure centre could be by women only. Proposed use to be mostly out of normal public opening hours of the centre. Was this consistent with Charter of Human Rights and Responsibilities Act 2006 ss 4, 7, 8, 12 and 19?
Decision	The Council was a public authority and was bound by the Charter. The exemption was allowed as it was a reasonable limitation on Human Rights and was consistent with the Charter.
Quotes	The Applicants submit and I agree, that the Council and (to the extent that it performs functions of a public nature on the Council's behalf) LMS are public authorities under s4 of the Charter. Section 4(1)(e) specifically states that a Council is a public authority for the purpose of the Charter. Under s4(1)(c), an entity (here, LMS) when exercising functions of a public nature on behalf of a public authority (here, the Council) is a public authority to that extent. I assume (without deciding) that the Tribunal, when determining exemptions, is a public authority. I have commented on the unusual nature of the exemption power in the BAE decision, and do not need to repeat what I said there.

Case	<i>YMCA - Ascot Vale Leisure Centre (Anti-Discrimination Exemption) [2009] VCAT 765</i>
Forum	VCAT Anti-Discrimination List
Issues	Application under Equal Opportunity Act 1995 s83 for exemption re opening of swimming pool facility out of ordinary opening hours for women only and to be staffed by women only at those times Was this consistent with Charter of Human Rights and Responsibilities Act 2006 ss7,8,32 and 38?
Decision	Question of whether VCAT was a public authority was unnecessary as bound to interpret legislation consistently anyway. This discrimination was justified and was not inconsistent with the Charter.

Case	<i>Kracke v Mental Health Review Board & Ors (General) [2009] VCAT 646</i>
Forum	VCAT General List
Issues	<p>Whether rights under the Charter were engaged in the unreasonable delay to review of patient treatment by the Mental Health Review Board and whether this was inconsistent with the Charter</p> <p>Rights included right to be free of medical treatment without full, free and informed consent, right to freedom of movement, right to privacy, right to liberty and security, right to a fair hearing.</p>
Decision	<p>In reviewing orders for the treatment of patients, the Mental Health Review Board was a tribunal acting in an administrative capacity, therefore it was a public authority and was bound by the Charter.</p> <p>The Charter does not apply retrospectively, however the Mental Health Review Board breached Mr Kracke's human right to a fair hearing under s 24(1) of the Charter as they did not conduct the reviews of his involuntary and community treatment orders within a reasonable time.</p> <p>Justice Bell set out the test by which public authorities should interpret legislation consistently with the Charter. He noted that this process requires a consideration of the issues of "engagement, justification and reinterpretation".</p> <p>Note this decision was later confirmed in <i>MH9 v Mental Health Review Board & Anor (General) [2009] VCAT 1199</i>, but the treatment plan in that case was justified.</p>

<p>Quotes</p>	<p>The Charter applies “vertically” to public authorities who are bound directly by its terms (especially s 38). By s 32(1), the Charter also applies “horizontally” to anybody whose rights, obligations and interests may be governed or affected by legislation, for all legislation must be interpreted compatibly with human rights so far as it is possible to do so. That is because the meaning of legislation is a question of law. As s 32(1) applies to the resolution of such a question, the human rights in the Charter become justiciable to that extent, whether or not the parties to the proceeding are all private or include a public authority affected in that capacity. If a court, tribunal or other interpreter makes an error of law in that regard, it is amenable to appeal or review in the usual way.</p> <p>The main provision by which obligations under the Charter are imposed is s 38(1), which provides this: “it is unlawful for a public authority to act in a way that is incompatible with a human right or, in making a decision, to fail to give proper consideration to a relevant human right.” The concept of a “public authority” is defined in s 4 and s 4(1)(j) specifically excludes a court or tribunal, except “when it is acting in an administrative capacity”.^[332] Thus, courts and tribunals acting in a judicial capacity are not public authorities, which means, in that capacity, they are not obliged by s 38(1) to observe the human rights specified in the Charter.</p> <p>To interpret s 6(2)(b) broadly would explode this structural feature of the Charter and offend against the principle that charters must be interpreted as a whole.^[333] While being a public authority bound under s 38(1) only when acting in an administrative capacity, a court or tribunal would come within its general scope because, on that interpretation, the “functions under Part 2” potentially encompass all of the human rights specified in that Part. The Charter would then operate indirectly to bring about what has been excluded directly. It would apply to courts and tribunals as if they were public authorities in all capacities when they are not. I cannot accept that was intended, even though I think it is the preferable outcome.</p> <p>The narrow construction must also be rejected. These are the powerful opening words of s 6(2): “This Charter applies to”.</p>
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Those words convey the meaning that what follows is an important description of the coverage of the Charter. Paragraphs (a), (b) and (c) identify respectively the Parliament, courts and tribunals and the public authorities “to the extent” that they have functions specified in divisions or parts of the Charter. I do not think the legislature would have used such a lynch-pin provision simply to confer on courts and tribunals a power like the one in s 24(3) not to publicise a judgment or decision.

.....

I conclude that reviewing orders for the involuntary treatment and plans for the general treatment of patients found to be mentally ill are functions of an administrative character. Therefore, when discharging its review functions in the present case, the board was acting in an administrative capacity within s 4(1)(j). In that capacity, the board was wholly bound by the Charter as a public authority .

Having regard to the importance of its decisions for the human rights of mentally ill people, that is entirely appropriate. Like mental health review tribunals elsewhere, the board must operate within the human rights framework created by the Charter. It would be surprising if it were otherwise.

.....

tribunal’s original jurisdiction involves some functions of a judicial character, but that is a separate jurisdiction of the tribunal, and not the jurisdiction being exercised here. As I have indicated, the other review jurisdictions of the tribunal are generally based on the model of providing merits review of decisions of an administrative character, as in the present case. I therefore accept the Attorney-General’s submission that, in its review jurisdiction, the tribunal is exercising administrative power and is thereby a “ public authority ” within s 4(l)(b) and (c) and not excluded by s 4(l)(j) of the Charter. The exercise by the tribunal of its review jurisdiction with respect to decisions of the board under the Mental Health Act is an example of this general type. There may be individual exceptions which have to be considered case by case

Case	<i>De Simone v Bevnol Constructions & Developments Pty Ltd</i> [2009] VSCA 199
Forum	VSCA
Issues	<p>Applicant sought stay of VCAT proceedings (so far as they related to him) on the basis that defending those proceedings might require him to waive his right to silence in any future criminal proceedings.</p> <p>Applicant also sought to have two questions of law referred to the Supreme Court under the Charter. Application was refused by a Vice-Presidential Member of VCAT and applicant sought leave to appeal.</p> <p>Issue was whether the Judge erred in the exercise of his discretion regarding the stay application. Relevant Charter provisions include ss 4, 6, 24, 25, 32, 33, 38 – Application refused.</p>
Decision	<p>A tribunal is not acting in an administrative capacity in a stay application. It is therefore not a public authority in this regard.</p> <p>(Confirmation of VCAT decision)</p>

Case	Drummond v Telstra Corporation Limited (Anti-Discrimination) [2008] VCAT 2630
Forum	VCAT Anti-Discrimination List
Issues	Age and race discrimination. Issue whether s 75 of the Victorian Civil and Administrative Tribunal Act 1998 is inconsistent with right to fair hearing granted by Section 24 of the Charter.
Decision	A Company limited by Shares and carrying on a commercial business (Telstra) is not a public authority.

Case	<i>Director of Housing v IF (Residential Tenancies)</i> [2008] VCAT 2413
Forum	VCAT Residential Tenancies
Issues	Breach of duty notice, application for a compliance order.
Decision	The Director of Housing is a public authority. However, the member decided that he was bound by the jurisdiction of VCAT and did not have authority to review an administrative decision by a government body. In obiter he noted that the Director of Housing had considered all the matters required by the Charter in any event.
Quotes	<p>I agree that the Director of Housing is a public authority as defined in section 4 of the Charter. This is clearly the case; the Director of Housing is a public official, and the Office of Housing (a unit of the Department of Human Services) is an entity established by a statutory provision that has functions of a public nature. Section 38 of the Charter states that “it is unlawful for a public authority to act in a way that is incompatible with a human right or, in making a decision, to fail to give proper consideration to a relevant human right.”</p> <p>After careful reflection, I do not consider that I have the jurisdiction to go behind the application made by the landlord, and review whether or not the landlord acted in a Charter compatible way in reaching the decision to make the application. In relation to this proceeding, in this jurisdiction, I can only make decisions about the provisions of the Residential Tenancies Act 1997 and the Victorian Civil and Administrative Tribunal Act 1998.</p>

Case	<i>Sabet v Medical Practitioners Board of Victoria (2008) 20 VR 414</i>
Forum	VSC Common Law Division
Issues	Review of suspended medical registration. Question was whether the Board had given adequate consideration to the right to be presumed innocent. Charter- ss 4, 7, 25, 34, 35, 38, 39.
Decision	Medical Practitioners Board is a public authority as it was established by statute and its functions are regulatory in nature and received public funding to perform these. Even though in performing its functions under the Act it was acting as a tribunal, it was acting in an administrative capacity. The Board did not breach a medical practitioner's right to be presumed innocent in disciplinary proceedings determining his capacity to practice medicine.
Quotes	The Charter was not intended to create new causes of action against public authorities, additional to those already available outside the Charter – which, in this case, are available to Dr Sabet under the ALA. Rather, s39 of the Charter provides that if a person otherwise has a right to seek relief or remedy on the basis that a public authority's decision was unlawful, then the person may seek that same relief or remedy on the ground that the act or decision was unlawful because of the Charter.

Case	<i>Carwoode Pty Ltd v Cardinia SC (Red Dot)</i> [2008] VCAT 1334
Forum	VCAT Planning & Environment List
Issues	Application for permits to subdivide land and construct Freeway Service Centres. This caused issues under the EPBC Act. A question was raised as to whether VCAT had failed to abide by the principles of natural justice and the Charter in its inspection procedures.
Decision	Without explicitly stating that the tribunal was a public authority, the members found that the tribunal was acting in an administrative capacity and was therefore required to interpret provisions in accordance with the Charter. The inspections were not contrary to the charter as it did not infringe upon the right to a fair hearing.

Case	<i>Guneser v The Magistrates' Court of Victoria</i> [2008] VSC 57
Forum	VSC Common Law Division
Issues	There was delay in charging defendant with a further indictable offence which could not be heard summarily. Charter - ss 2, 4, 39 and 49.
Decision	Any decisions that could be attributed to public authorities were made before the commencement of the charter. Decisions made after the commencement of the Charter were not made by public authorities . The Charter did not apply.
Quotes	It seems to me that, whilst acting as a member of Victoria Police, the informant is within the Charter definition of "a public authority". So too is the Office of Public Prosecutions. A court is not included in the statutory definition "except when it is acting in an administrative capacity". A committal is an example of that capacity, so that the Magistrate's decision to commit Mr Guneser on 16 January 2007 would be a decision of a public authority. I doubt that the Magistrate's decision on 1 March 2006 would be regarded as part of the committal proceeding and, therefore, also a decision of a public authority, but I do not need to decide this point.

Case	<i>R v Williams (2007) 16 VR 168</i>
Forum	VSC Criminal Division
Issues	Accused applied for adjournment because his choice of counsel was unavailable. This was refused. Charter provisions - ss 6, 7, 24, 25, 49(2).
Decision	<p>The Charter had no relevance to the adjournment application because the proceeding had commenced prior to the introduction, proclamation or commencement of the Charter and, more particularly, Pt 2. [48].</p> <p>Justice King found that for the purposes of the Charter, a judge was not acting in “an administrative capacity” when hearing an adjournment application of a trial which had already been listed and was not a “public authority”.</p> <p>It was not in the interests of justice to adjourn the trial for a period of at least six months, on the expectation that the accused would be able to brief counsel of his choice. Even if the Charter had been operative, the decision would have been the same. While the court would do all it could to accommodate counsel of choice for accused persons, it could not be that they were entitled to select a counsel who would not be available for a lengthy period and thereby compel the court to adjourn matters that were capable of being heard.</p>

APPENDIX 4 - List of Reference Group Committee Members

Tamara Brezzi, VPELA Vice President, Norton Rose	Zachary Tyler, Freehills
Adrian Finanzio, VPELA Board Member, Barrister	Anna Sinclair, Freehills
Stephanie Price, Minter Ellison	Holly Stansfield-Smith, Rigby Cooke
David Gabriel-Jones, The Public Land Consultancy	Sophie McGuinness, Rigby Cooke
Louise Hicks, DLA Phillips Fox,	Katherine Paterson, Bass Coast Shire Council
Astrid Di Carlo, Russell Kennedy	Damien Chappell, Landserv
Rachael Webb, Norton Rose	Anne Batrouney, Beca
Jennifer Trehwella, Norton Rose	Rachel Ducker, Sinclair Knight Merz
Chris Mason, St Quentin Consulting	Karen Hose, Borough of Queenscliffe
Meg Lee, Allens Arthur Robinson	Eli Greig, City of Port Phillip
Tim Power, Freehills	