Factoring climate change and sea level rise into planning and infrastructure decisions?

by Kirsty Ruddock[1]

Scientific evidence is indicating that there are significant climate change impacts ahead for coastal communities. The potential impacts include sea level rise, increased coastal flooding and storm surges, increased coastline erosion and the destruction of property.[2] Recent studies have demonstrated that some climate change impacts are now unavoidable. This means that even if greenhouse gas emissions are significantly reduced today, temperature increases and sea level rise are almost certain to occur over the next 50 years due to the time-lag effect of climate change.[3] The IPCC has published studies confirming that a measurable increase in temperature and sea level rise is already occurring.[4] In fact many scientists are predicting that the sea level rise is now more significant than even the IPCC projections have indicated to date.[5] This will have significant ramifications for Australia where 85% of our population lives on the coast.

The primary focus of climate change law and policy thus far has been on the need for mitigation and binding emissions targets to achieve large cuts in greenhouse gas emissions.[6] At present there are few laws that address coastal climate change impacts. Only recently has the NSW Department of Climate Change and the Environment released a discussion paper on sea level rises on our coasts.[7] So far most of the law on climate change and the coast has been generated by the Courts.

Initially most climate change cases focused on government decisions about new power stations and new coal mines that would produce significant greenhouse gas emissions.[8] More recently cases have focused on the failure of decision makers to

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[2] Inter-governmental Panel of Climate Change, (2007), *Working Group II Report "Impacts, Adaptation and Vulnerability"*, Chapter 6- coastal systems and low lying areas.

[3] Wigley, T. M. L., (2005) "The climate change commitment' 307 *Science* 1766-1769; Meehl *et al.*, (2005), "How much more global warming and sea level rise?" 307 *Science* 1769-1772

[4] Inter-governmental Panel of Climate Change, (2007) "*Assessment of observed changes and responses in natural and managed systems*". This report found that physical and biological systems on all continents and in most oceans are already being affected by recent climate changes, particularly regional temperature increases.

[5] Rahmstorf, S et al, "Recent climate observations compared to projectsion", *Science*, v.316, no. 5825, pg.709.

[6] Examples include the recent Federal Government proposals for an emissions trading scheme, mandatory renewable energy targets and legislated emissions targets.

[7] Department of Environment and Climate Change (DECC) Draft Sea Level Rise Policy Statement, found at http://www.environment.nsw.gov.au/resources/climatechange/09125DraftSLRpolicy.pdf (downloaded 27/4/09).

[8] The first case to raise such issues was *Greenpeace Australia Limited v Redbank Power Company Pty Ltd and Singleton Council* (1994) 84 L.G.E.R.A 143, where the Court imposed conditions upon a coal-fired power station in NSW requiring it to mitigate the effects of greenhouse gas emissions by the planting of sinks, the limitation of fuel sources for the station to tailings from particular mines,

consider the potential impacts of climate change on proposed developments in vulnerable coastal areas. Several of these cases have emphasised the need to consider the climate change impacts on our coasts when determining development applications. Those cases are explored below.

Walker v Minister for Planning

In *Walker v the Minister for Planning & Ors* (Walker case)[9], Justice Biscoe of the NSW Land and Environment Court held that a concept plan approval for residential development and an aged care facility on flood-prone land was invalid on the grounds that the Minister for Planning had failed to consider whether the existing flood risk in the area would be aggravated by climate change. The judgment contains a comprehensive review of Australian and overseas cases dealing with climate change issues and highlighted the potentially serious effects of climate change upon coastal development.

The Walker case related to a controversial site known as Sandon Point which comprises mostly vacant coastal land north of Wollongong. The area has been the subject to considerable litigation in the past relating to indigenous cultural heritage.[10] The site was known to be highly flood-prone. The proponents in this case, Stockland Development and Anglican Retirement Villages, sought concept plan approval for subdivision of the western part of the site into approximately 180 residential dwelling allotments, 3 super-lots for future apartment or townhouse development, 200 to 250 seniors living units and a residential aged care facility.

Stockland Development and Anglican Retirement Villages lodged a concept plan proposal under Part 3A of the *Environmental Planning and Assessment Act 1979* (EP & A Act). Part 3A of the EP & A Act was introduced in 2005 to streamline development processes for major projects, by making the Minister for Planning the sole consent authority. [11] A concept plan only needs to describe the proposed development in 'broad brush' terms. [12] A concept plan approval is taken to indicate "in-principle" approval of a proposed project, which the proponent can rely on prior to drawing up more detailed plans.[13]

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and the monitoring of and reporting on stack emissions. See also: *Australian Conservation Foundation v La Trobe City Council* (2004) 140 L.G.E.R.A 100; *Wildlife Preservation Society of Queensland Proserpine/Whitsunday Branch Inc v Minister for the Environment & Heritage* (2006) 232 A.L.R 510; *Gray v Minister for Planning* (2006) 152 L.G.E.R.A 258; *Anvil Hill Project Watch Association Inc v Minister for the Environment and Water Resources* [2007] F.C.A 1480; and *Re Xstrata Coal Queensland Pty Ltd & Ors* [2007] Q.L.R.T 33 where merits review was used to object to a mining lease before the Land and Resources Tribunal.

[9] *Walker v Minister for Planning & Ors* [2007] NSWLEC 741.

[10] See for example, *Carriage v Stockland Development Pty Ltd* (No 4) [2004] NSWLEC 553,

[11] Major projects are projects that are, in the opinion of the Minister, of 'regional or state significance' or 'essential for economic, environmental or social reasons".

[12] Section 75M, *Environmental Planning and Assessment Act 1979*.

[13] When determining to approve a concept plan, the Minister must decide what further assessment is required before final approval is given. Final project applications for stages or elements of the concept plan may be determined by the Minister or by the local council. Section 75P, *Environmental Planning and Assessment Act 1979*.

An important issue to be resolved in connection with the concept plan was the treatment of three flood prone watercourses on the site. The proponent wanted to construct relatively narrow and straight stream corridors which would maximise the developable area. The then Department of Environment and Conservation ("DEC"), in its submission, argued that wider creek corridors should be provided to reduce flooding risk and preserve ecological values. A number of expert reports were prepared on the subject of flooding risk. However none of the reports specifically considered whether the flood risk would be exacerbated by climate change.

The then Minister approved the concept plan subject to conditions which modified the creek corridors proposed by the proponent, but not to the full width recommended by DEC. Neither the Minister nor the Director-General of Planning made any reference to the effects of climate change.

The applicant alleged that the Minister when granting concept plan approval had failed to consider the principles of ecologically sustainable development ("ESD") because he had not considered whether the flood risk on the site would be exacerbated by climate change. The applicant needed to show that the principles of ESD were a mandatory relevant consideration for the Minister in exercising his power to grant concept plan approval. Since ESD is not explicitly a head of consideration under Part 3A of the EP&A Act, the applicant argued that such a mandatory consideration should be implied.

The applicant relied on the decision in *Gray v the Minister for Planning & Ors*[14], a case concerning the approval of a coal mine under Part 3A. In that case, Pain J held that a decision by the Director-General of Planning (D-G) to exhibit an environmental assessment was invalid on the grounds that the D-G had failed to consider the principles of ESD. Failure to consider ESD in that case was demonstrated by the fact that the assessment had no details of the emissions which would be produced from the burning of the coal overseas as a result of the mine.[15] Her Honour reviewed several decisions in the Land and Environment Court which had discussed the centrality of ESD principles to environmental decision-making, and concluded that ESD was a matter that had to be considered in all decisions made under the *EP&A Act.*[16]

Biscoe J treated the question rather differently. His Honour distinguished previous cases regarding development applications lodged under Part 4 of the *EP&A Act* which said that ESD was a relevant consideration, because those cases hinged upon the fact that the "public interest" was an express head of consideration under Part 4, and ESD was held to be an element of the public interest.[17] Instead, Justice Biscoe found that clause 8B of the *EP & A Regulation 2000* required the D-G's report to

[14] (2006) 152 LGERA 258
[15] *Walker v Minister for Planning & Ors* [2007] NSWLEC 741at [126] and [135]
[16] *Walker v Minister for Planning & Ors* [2007] NSWLEC 741at [109] to [114
[17] *Walker v Minister for Planning & Ors* [2007] NSWLEC 741 at [151].

consider "any aspect of the public interest that the Director-General considers to be relevant to the project". Because it was established in the case law that the public interest included the principles of ESD, this meant that the D-G had to form an opinion about what aspects of ESD were relevant to the project, and ensure that these matters were addressed in his report to the Minister.[18] His Honour found that the D-G had committed a legal error by failing to consider whether climate change-related flood risk was a relevant matter which needed to be considered in the assessment report, and that the final decision to approve the concept plan was therefore invalid.[19]

His Honour observed:

> *Climate change presents a risk to the survival of the human race and other species. Consequently, it is a deadly serious issue. It has been increasingly under public scrutiny for some years. No doubt that is because of global scientific support for the existence and risks of climate change and its anthropogenic causes. Climate change flood risk is, prima facie, a risk that is potentially relevant to a flood constrained, coastal plain development such as the subject project.*[20]

The Minister appealed the decision to the Court of Appeal.

Court of Appeal decision-*Minister for Planning v Walker*[21]

On appeal, the NSW Court of Appeal in *Minister for Planning v Walker* overturned the ruling of Biscoe J in the Land and Environment Court. The Court of Appeal found that while the Minister must consider the public interest under part 3A of the *EP & A Act*, the failure to consider climate change did not invalidate the Minister's decision. Justice Hodgson stated that it was "somewhat surprising" that the Minister failed to consider the principles of ESD including the precautionary principle or the principle of inter-generational equity, but that does not constitute a basis for ruling his concept plan approval void.

Justice Hodgson found the 'mandatory' requirement that the Minister have regard to the public interest "does not of itself make it mandatory ... that the minister have regard to any particular aspect of the public interest, such as one or more of the principles of ESD.

> *In my opinion, one difficulty with the view that failure to consider ESD principles renders void a Minister's decision ... is that the encouragement of ESD is just one of many objects set out s.5 of the Environmental Planning and Assessment Act 1979 (NSW), some of which seemingly would have no relevance to many decisions....*

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[18] *Walker v Minister for Planning & Ors* [2007] NSWLEC 741at [154].
[19] *Walker v Minister for Planning & Ors* [2007] NSWLEC 741at [161].
[20] *Ibid*.
[21] [2008] NSWCA 224, *(2008)* 161 LGERA 423.

> *It would in my opinion be difficult to discern a legislative intention that decisions by the Minister be void if the Minister had failed to take into account an object of the EPA Act which was not materially relevant to the decision in question.*

The judge reached this conclusion even though he said the evidence on the precautionary principle and inter-generational equity "was sufficient to draw the inference that these principles were not considered" by the Minister in granting approval for the concept plan.

> *I agree with the primary judge that consideration of these matters in relation to this project*
> *would have required consideration of long-term threats of serious or irreversible 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.*

The Court found this emission "somewhat surprising and disturbing". Hodgson J further stated that, "since these aspects of ESD were not addressed by the Minister in giving his approval to the concept plan, in my opinion they will need to be addressed when development approval is sought". The Court of Appeal failed to recognise that the Minister may, when granting development consent to a project under Part 3A, approve the project without further environmental impact assessment under s.75P(1)(c). As a result, the Court appears to have made the presumption that ESD would be necessarily considered by the Minister at a later time when full development approval is sought.

Interestingly, Justice Bell stated that at some stage the principles of ESD are likely to come to be seen as so plainly an element of the public interest in relation to most if not all decisions that failure to consider them will become strong evidence of failure to consider the public interest and/or to act bona fide in the exercise of powers granted to the Minister, and thus become capable of voiding decisions.[22] It may be that failure conscientiously to address principles of ESD in dealing with any development application may be considered evidence of failure to take into account the public interest.[23] This means there is a key way that even under Part 3A, Courts will in future require the consideration of climate change as part of the public interest. The EDO is currently bringing another case that will test to what extent ESD will be required to be considered as part of the public interest.[24]

Ms Walker sought special leave to appeal to the High Court. The application was heard in March 2009. The High Court declined to grant leave on the basis that while there were valid arguments in her favour, they did not think those arguments would succeed if the appeal was heard by the High Court.

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[22] at [56]
[23] at [63].
[24] *Sweetwater Action Group Inc v Minister for Planning & Huntlee Holdings Pty Ltd*

Aldous v Greater Taree City Council[25]

This case concerned a development application for a dwelling on a beachfront property near Taree. The applicant was the owner of the property situated immediately behind the proposed development. The importance of this case is that it considers whether the principles of ESD are included in the 'public interest' and therefore mandatory considerations under s79C of the EP & A Act.

The case was argued on six grounds. The first related to the sub-delegation of decision-making. The second ground related to whether the decision lacked finality and certainty in relation to the conditions imposed on the approval. The claim was successful only on these two grounds. The remaining grounds were dismissed.

The third argument was that the Council failed to take into account the principles of ESD, specifically the principles of intergenerational equity and the precautionary principle. The applicant argued that the Council failed to take into account or assess climate change induced coastal erosion. The applicant submitted that it was mandatory for the council to consider documents indicating the increased rate of coastal erosion.[26] The council was in the process of commissioning a coastal impact study but had made its decision prior to receipt of the study. The applicant argued that the council was bound to refuse the development application or defer consent until it received the results of the coastal impact study.[27]

His Honour reviewed the Court of Appeal's decision in *Walker*,[28] noting in obiter that the appeal judges in *Walker* characterised ESD as an undeveloped legal concept in 2006 at the time the approval was given, but that the growing public awareness of ESD may mean that it now falls within the public interest.[29]

Biscoe concluded that in the present case, the council had a mandatory obligation under s79C of the *EP & A Act* to take into consideration the public interest which included the principles of ESD, but that it had not been established that the council failed to do so.[30] "The council took the issue of coastal erosion and its inducement by climate change seriously as evidenced by, among other things, the steps taken to prepare a coastal zone management plan for the Old Bar area and the briefing of a consultant to prepare the necessary study".[31] The applicant therefore failed on the third ground.

Gippsland Coastal Board v South Gippsland SC[32]

Along a similar vein, the Victorian Civil and Administrative Tribunal (VCAT) in *Gippsland Coastal Board v South Gippsland Shire Council*, determined that sea level

[25] [2009] NSWLEC 17
[26] *Aldous v Greater Taree City Council* [2009] NSWLEC 17 at [23].
[27] *Aldous v Greater Taree City Council* [2009] NSWLEC 17 at 23], citing *Broad Henry v Director-General, Department of Environment and Conservation* [2007] NSWLEC 722, (2007) 159 LGERA 172 at [111] per Preston J.
[28] *Aldous v Greater Taree City Council* [2009] NSWLEC 17 at [23] – [31].
[29] *Aldous v Greater Taree City Council* [2009] NSWLEC 17 at [28].
[30] *Aldous v Greater Taree City Council* [2009] NSWLEC 17 at [40].
[31] *Aldous v Greater Taree City Council* [2009] NSWLEC 17 at [77].
[32] *[2008] VCAT 1545*

rises must be adequately considered by a decision maker in the grant of approval for a housing estate on coastal flood prone grazing land beyond what has been previously determined in current Council engineering and hydrological studies.

The case succeeded on another planning point in that the development was in a Farming Zone, outside the development area of the township of Toora. The development was therefore inconsistent with the purpose and decision guidelines of the Farming Zone and should be refused on this basis alone. Part of the Farming Zone guidelines required that proposals not lead to a proliferation of dwellings in the area. The addition of 6 dwellings was found to erode the character of the zone.

VCAT also found that sea level rise and the risk of coastal inundation were found to be relevant matters to consider 'in appropriate circumstances,' to be determined on a case-by-case basis. VCAT applied the precautionary principle by finding that sea level rise and more extreme weather conditions presented a reasonably foreseeable risk of inundation to the site.

The case is particularly salient because it uses the precautionary principle in determining whether possible intergenerational effects of climate change can be taken into account in making planning decisions. While the tribunal recognised that 'the relevance of climate change to the planning decision making process is still in an evolutionary phase', it is noteworthy that in this case the tribunal used scientific data with acknowledged and inherent attached uncertainties and still concluded that climate change presented a 'reasonably foreseeable risk' of coastal inundation. That is, it applied the precautionary principle.

In complete contrast the VCAT decision in *Santos v East Gippsland Shire Council*[33] reviewed the EPA's approval (and Councils deemed refusal which was subsequently approved with conditions) to grant works approvals for the upgrade of an existing natural gas facility located in the dunal systems of the Snowy River estuary. The Tribunal affirmed that the approval was correctly granted. In doing so the decision in *Gippsland Coastal Board v South Gippsland Shire Council* was not applied nor mentioned in the case. Of particular note is the statement from VCAT that climate change impacts were "sufficiently delayed to not be relevant".

Northcape Properties v District Council of Yorke Peninsula

In *Northcape Properties Pty Ltd v District Council of Yorke Peninsula* (Northcape case)[34], the South Australian Supreme Court found that climate change was a sufficient basis to support the refusal of a coastal development application. The case related to a development consent on Yorke Peninsula for the subdivision of land into 80 allotments. The council rejected the application in June 2006. Northcape appealed against the council's decision to the Environment, Resources and Development (ERD) Court of South Australia. The ERD Court upheld the

[33] [2008] VCAT 1658
[34] *Northcape Properties Pty Ltd v District Council of Yorke Peninsula* [2008] SASC 57.

decision and refused the appeal in September 2007, whereby Northcape appealed to the Supreme Court.

One of the key issues in the case related to whether the Commissioner had erred in rejecting the development proposal because it offends the council Development Plan for coastal reserves and planning of development near the coast. Relevantly, the council's Development Plan contained several objectives that focused on coastal protection and hazards including:

> *1: To retain, protect or enhance the natural coastal environment of South Australia.*
>
> *2: To promote development which recognises 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.*
>
> *11: To encourage development that is located and designed to allow for changes in sea level due to natural subsidence and probable climate change during the first 100 years of the development. This change to be based on the historic and currently observed rate of sea level rise for South Australia with an allowance for the nationally agreed most-likely predicted additional rise due to global climate change.*

The objectives were explained in detail in the Plan as follows:

> *Development a considerable distance from the coast (mainland or island) can affect all these areas if it influences the environment, general character and amenity of the coastal area or interferes with coastal processes such as erosion, tide and storm flooding or sand drift, for these reasons the following objectives are for the control of any development which could affect coastal areas, or could itself be affected by coastal processes, and, as such, may be applicable beyond, as well as within, the boundaries of any designated costal zone.*
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> *Much of the coast is subjected to the forces of waves, tides and sea-currents, particularly during storms. 'Soft' coasts develop a balance between the sea and the land which changes with the seasons, a so called dynamic equilibrium. For example, beach and sand dunes built-up during months of relative calm will be eroded during stormy seasons, only to be built-up again after the storms have passed. As well, wave action and currents are continually moving sand along the shore, often resulting in a net drift of material in one direction.*
>
> *Development can either directly or indirectly, interfere with these processes for example by changing surface and groundwater flows, and result in permanent loss of beach and dunes.*

Expert evidence was called by both parties before the ERD Court and the Court accepted the evidence of the council's expert Mr Patterson, who suggested over the

next 100 years the coast will shift 35-40 metres inland making it highly likely the development will be impacted by coastal erosion. [35] On the basis of the evidence, the Commissioner concluded:

> *When all of the evidence is examined it is reasonable to conclude that the coastline is in a receding phase. It is probably oscillating but the evidence about erosion and sea level rise suggests that it is in a long term phase of moving inland. Mr Patterson's evidence about the extent to which it is receding and, as a consequence, the erosion and sea level rise buffer that should be provided is the most reliable. I accept that over the next 100 years the coastline (when measured from the high water mark) will shift inland by 35-40 metres.*
> *If the terms of the Plan were to be read such that it is necessary only to keep the high-water mark clear of the proposed allotments, an erosion buffer of that depth might be sufficient. The high water mark would intrude near to or within part of the reserve (Lot 80) if it recedes a distance of 40 metres. However, to position new development in relation to the likely future high water mark would be to ignore other provisions of the Plan."*[36]

Debelle J found the Commissioner correctly interpreted the development proposal as 'no small risk' in respect of coastal hazards. He also found that the Commissioner correctly interpreted the purposes of the Development Plan and the expert evidence as outlined above. In particular he 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 features*."[37]

Accordingly, the development application was refused. The decision shows that Councils that have strong statements about climate change in coastal areas are often able to rely on those statements to refuse inappropriate developments.

Charles & Howard Pty Ltd v. Redland Shire Council[38]

This case considered climate change induced flood risk on flood prone land that was proposed to be filled for residential development. The appeal was concerning a condition imposed by the council requiring the proposed dwelling to be relocated to an area less vulnerable to tidal inundation. The primary judge in the Queensland Planning and Environment Court had held that the condition was justified, for to develop otherwise would contravene the local planning policy requiring a buffer zone between the development and the coastal zone.[39] The Court of Appeal also held this condition was justified.

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[35] *Northcape Properties Pty Ltd v District Council of Yorke Peninsula* [2008] SASC 57 at [17] & [22]
[36] *Northcape Properties Pty Ltd v District Council of Yorke Peninsula* [2008] SASC 57 at [17].
[37] *Northcape Properties Pty Ltd v District Council of Yorke Peninsula* [2008] SASC 57 at [28].
[38] [2007] QCA 200.
[39] *Charles & Howard Pty Ltd v Redland Shire Council* [2007] QCA 200 at [4].

Section 3.5.30 of the *Integrated Planning Act 1997* (Qld) (IPA) requires that conditions imposed by local governments are reasonable. The applicant argued that the Council's requirement to build the house outside of the flood zone was not reasonable on several grounds.[40]

- The applicant argued that the primary judge erred by partially relying on a later 2006 planning scheme instead of on the 1998 scheme in force at the time of the decision. However under the IPA, the Court is entitled to give weight to any new policies the court considers appropriate.[41] The Court of Appeal held that there was no evidence the primary judge did not make the decision under the 1998 planning scheme.[42]
- The 1998 strategic plan stated that when establishing the width of land to be kept in its natural state, it is necessary to "take into consideration sea level changes which may result from changes in climatic conditions...".[43] The applicant further argued that by referring to this strategic plan, the primary judge erroneously took on the Council's responsibility as planning authority in determining the issue. The Court of Appeal held that it was appropriate for the primary judge to take the strategic plan into consideration, as well as accept expert evidence of the impact of climate change on sea levels.[44]

Two other arguments (not relevant) also failed.[45]

The importance of this case is that careful conditions that reflect Council plans to protect areas against climate change will be upheld by Courts.

Law, policies and Council liability

Some of the cases show that where Councils have clear laws, the Courts will often uphold conditions or decisions to refuse development in coastal areas. In NSW there are currently few pieces of legislation that relate to, or even mention, climate change issues. Recently, the Environmental Defender's Office (NSW) was commissioned by the Sydney Coastal Councils Group (SCCG) to conduct an audit of legislation to determine the current responsibilities of coastal councils in relation to climate change risks.[46] The report (hereafter 'SCCG report') analysed federal, state (NSW) and local legislative instruments to identify instruments that contained the words 'climate change', 'sea level rise' and 'greenhouse' and then determined the responsibilities these instruments placed on decision-makers. The SCCG report

[40] *Charles & Howard Pty Ltd v Redland Shire Council* [2007] QCA 200 at [5] – [6]
[41] *Charles & Howard Pty Ltd v Redland Shire Council* [2007] QCA 200 at [19].
[42] *Charles & Howard Pty Ltd v Redland Shire Council* [2007] QCA 200 at [19]
[43] *Charles & Howard Pty Ltd v Redland Shire Council* [2007] QCA 200 at [26].
[44] *Charles & Howard Pty Ltd v Redland Shire Council* [2007] QCA 200 at [28].
[45] *Charles & Howard Pty Ltd v Redland Shire Council* [2007] QCA 200 at [21]-[25].
[46] NSW Environmental Defender's Office, (2008), *Coastal Councils and Planning for Climate Change: An assessment of Australian and NSW legislation and government policy provisions relating to climate change relevant to regional and metropolitan coastal councils* – A report prepared for the Sydney Coastal Councils Group.

found that of the 137 relevant legislative instruments examined, only 16 contained the terms of interest. Of these, 3 were Commonwealth Acts, 4 were NSW Acts, 1 was a NSW Regulation and 8 were Local Environmental Plans created under the *Environmental Planning and Assessment Act 1979*.

The SCCG report found that the legislation identified placed no direct obligations on decision-makers in relation to coastal adaptation.[47] Indeed, none of the Commonwealth and NSW Acts refer to climate change impacts in the coastal zone at all.[48] Significantly, the *Coastal Protection Act 1979,* which is the principal piece of legislation that applies to the NSW coastal zone, does not mention climate change or sea level rise in any of its provisions.[49] This is despite the fact that one of the stated aims of the *Coastal Protection Act* is to provide for the protection of the coastal environment of the State "for the benefit of both present and future generations".[50] Indeed, the *Coastal Protection Act 1979* contains no prescriptive requirements on decision-makers to conduct adaptation activities or to refuse developments subject to increased risks due to climate change. This is a severe impediment to early adaptation action in the vulnerable coastal zone. Similarly, the *Environmental Planning and Assessment Act 1979*, which is the central piece of legislation regulating development in NSW, does not contain any terms that refer to 'climate change', 'greenhouse', or 'sea level rise' even though appropriate development processes are crucial to achieving a robust adaptation framework for NSW. Although as we have mentioned earlier, the cases are indicating that despite no express reference to climate change, Councils will be required to consider climate change in approving development applications.

In NSW only 8 LEPs contained the terms 'climate change', 'greenhouse', and 'sea level rise'. 5 of these LEPs contained provisions directly relevant to climate change impacts in the coastal zone. The provisions identified in these 5 LEPs fell into two categories;

- provisions found in objects clauses; and
- provisions setting out mandatory matters for consideration for decision-makers in their determination of development applications

Objects clauses

[47] However, there are several government policies that provide the capacity to address climate change impacts. These include the *NSW Coastal Policy 1997*, which requires the implementation of appropriate planning mechanisms that incorporate sea level change scenarios set by the Inter-governmental Panel on Climate Change. This policy is a mandatory relevant consideration for councils when considering development applications in the coastal zone (Regulation 92, *Environmental Planning and Assessment Regulation 2000*).

[48] These are: *Environment Protection and Biodiversity Conservation Act 1999 (Cth)*, *Renewable Energy (Electricity) Act 2000 (Cth), National Greenhouse and Energy Reporting Act 2007, Electricity Supply Act 1985 (NSW), Energy and Utilities Administration Act 1987 (NSW), Threatened Species Conservation Act 1995 (NSW), Water Management Act 2000 (NSW).*

[49] The *Coastal Protection Act 1979* contains provisions relating to the use and supervision of the coastal zone, the carrying out of development within the coastal zone and the preparation of Coastal Zone Management Plans.

[50] Section 3, *Coastal Protection Act 1979*

Objects clauses are found in most pieces of legislation. However, objects clauses are not clearly enforceable, especially where there are no provisions requiring consideration of the objects or where the various objects are unprioritised. Objects clauses are usually considered aspirational, not prescriptive.[51] For example, Clause 5.5 of the Standard Instrument- Principal Local Environmental Plan (which provides a mandatory state-wide template LEP) lists as one of its objects to 'recognise and accommodate coastal processes and climate change'. However, other objects include to "provide opportunities for pedestrian public access to and along the coastal foreshore" and to "protect amenity and scenic quality". There is no priority attributed to the particular objects, nor any particular weight allocated to them. The SCCG report found that references such as this place minimal, or no, obligations on local Councils to address climate changes impacts in the coastal zone. This is because there are no provisions in these LEPs that direct councils to have regard to the objects when making decisions, such as when assessing development applications in the coastal zone. The SCCG report concluded that objects clauses need to contain prescriptive provisions which require the consideration of climate change to be of use.

Mandatory matters for consideration

Several of the LEP provisions identified in the SCCG report require that potential climate change impacts are considered when making decisions on development applications in the coastal zone. For example, under Clause 5.5 (2) of the Standard LEP, consent must not be granted to development on land that is wholly or partly within the coastal zone unless the consent authority has considered:

The effect of coastal processes and coastal hazards and potential impacts, including sea level rise, on the proposed development and arising from the development as well as the cumulative impacts of the development on the coastal catchment

However, although this provision requires the consideration of coastal processes subject to climate change, there is no express requirement to prohibit development that will be subject to potentially significant climate change impacts, nor any compulsory conditions that must be attached to any development consent. This provision merely ensures that climate change impacts are taken into account when assessing a development application. Since coastal processes are only one of a number of mandatory considerations the decision-maker must take into account, it is open to the decision-maker to determine what weight should be attributed to

[51] However, objects clauses can be important, as they are often used by the courts in interpreting statutory obligations, especially where provisions are ambiguous or seemingly inconsistent. This requirement is found within section 33 of the Interpretation Act (NSW) 1987: *In the interpretation of a provision of an Act or statutory rule, a construction that would promote the purpose or object underlying the Act or statutory rule (whether or not that purpose or object is expressly stated in the Act or statutory rule or, in the case of a statutory rule, in the Act under which the rule was made) shall be preferred to a construction that would not promote that purpose or object.*

particular matters. As was held by the High Court in *Minister for Aboriginal Affairs v Peko-Wallsend Ltd*[52]:

In the absence of any statutory indication of the weight to be given to various considerations, it is generally for the decision-maker and not the courts to determine the appropriate weight to be given to the appropriate matters which are required to be taken into account in exercising the statutory power.

The courts will therefore not intrude on the "balancing act" carried out by decision-makers in reaching their decisions.[53] As a result, the SCCG report concludes that the identified provisions do not prescribe any adaptation action or require that 'climate friendly' decisions are made.[54] In order to deal with the impacts of climate change in coastal areas it may be necessary to have much more prescriptive provisions that prohibit development in inappropriate areas.

Conclusions

The law clearly requires Councils to consider climate change in making decisions in the coastal zone. It is arguable that the same principles could apply over time to bushfire and water issues. Councils need to be careful to ensure that they consider climate change in their decision making otherwise they could be challenged later on through negligence or public nuisance claims. One way of minimising their risks is to ensure that their Local Environmental Plans clearly address climate change impacts and require consideration of those issues in sensitive coastal areas.

[52] (1986) 162 CLR 24.

[53] If mandatory considered are not considered at all then this may provide a basis for establishing a legal error, which may lead to the Land and Environment Court setting aside a development consent, or deeming it void on the basis of a failure to take into account a relevant consideration *Parramatta City Council v Hale* (1982) 47 LGRA 319.

[54] However, note that manifestly unreasonable decisions will not be protected even where councils can show that they considered all relevant matters (*Associated Provincial Picture Houses v Wednesbury Corporation* (1948) 1 KB 227.