



EDO Qld.

Environmental Defenders Office

*Using the law to protect
our environment.*

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Director, Environment Planning
Department of Environment and Heritage Protection
By email only: coastal.support@ehp.qld.gov.au

EDO Qld's submission on proposed changes to Coastal Management Districts

EDO Qld welcomes the opportunity to comment on the proposed changes to the declared Coastal Management Districts maps (**CMD maps**). The Environmental Defenders Office (Qld) (**EDO Qld**) is a non-profit, non-government community legal centre with expertise in environmental and planning law. We assist Queenslanders who live in rural, coastal and urban areas to understand and enforce their legal rights to protect the environment. EDO Qld has over 20 years of experience in litigation, community legal education and law reform submissions on public interest environment and planning law matters.

Summary of submission

EDO Qld opposes the proposal to remove sea level rise projections from the CMD maps. We consider the Queensland Government should show leadership in climate change adaptation and retain a strong role in ensuring adequate planning and assessment of sea level rise projections. We reject the proposal for the following reasons:

1. As a result of these changes, it is expected that there will be litigation against the government by the future generation of Queensland. It is ultimately the hardworking people of Queensland who will be paying for the costs of defending such action through taxpayers and rate payers.
2. Devolving sea level rise planning to local governments will mean a lack of consistency across Queensland, variations in planning approaches, and conceivably some local governments failing to address sea level rise at all.
3. There is an economic imperative to act now, rather than ignoring the challenges we know will occur. The Queensland Government is walking away from climate change adaptation and planning. However, climate change and sea level rise will happen anyway, regardless of any changes to weaken adaptation regulation. Taking this step will simply result in Queensland being less prepared when it does occur.
4. As this step will result in weaker protection for coastal areas from climate change impacts, it conflicts with the draft Reef 2050 Long-Term Sustainability Plan¹ and

¹ Draft Reef 2050 Long-Term Sustainability Plan (2014), Commonwealth Department of Environment, available here: <http://www.environment.gov.au/marine/great-barrier-reef/long-term-sustainability-plan>

Queensland's commitments in the Great Barrier Reef Intergovernmental Agreement.² Ensuring strong climate change adaptation and resilience, such as planning for sea level rise, is an essential requirement set out in these two main policies concerning Reef protection.

1. Setting out the facts: sea level rise in Queensland will occur

If the Queensland Government removes sea level rise projections from the CMD maps, it means that proposed development in those areas will not need be assessed for projected sea level rise (such as excluding the application of Module 10 of the State Development Assessment Provisions to proposed development).

The most recent Intergovernmental Panel on Climate Change (IPCC) report suggests that a global rise in sea levels of 0.53 to 0.97m is likely in the absence of timely measures to reduce greenhouse gas emissions.³ The likely consequences for the Queensland coast are well documented. A study conducted by CSIRO determined that there are currently 35,200 residences exposed to storm tide inundation, with a likely damage bill of \$1.1 billion if an event occurs. With the same planning regulation as today, this could rise to 61,500 structures and a \$3.9 billion damage bill by 2070.⁴

2. Liability for failure to include sea level rise in policy

Failure to consider sea level rise in planning policies and decisions will expose government to legal liability. In particular, it is conceivable that landholders receiving development approval to build in risky areas will pursue negligence claims in the future as the impacts of sea level rise materialise.

Although the *Civil Liability Act 2003* (Qld) (CLA) places some limits on the liability of public authorities, the reach of these provisions should not be overestimated.

Section 35 of the CLA states that 'the following principles apply to a proceeding in deciding whether a public or other authority has a duty or has breached a duty—

- (a) the functions required to be exercised by the authority are limited by the financial and other resources that are reasonably available to the authority for the purpose of exercising the functions;
- (b) the general allocation of financial or other resources by the authority is not open to challenge;
- (c) the functions required to be exercised by the authority are to be decided by reference to the broad range of its activities (and not merely by reference to the matter to which the proceeding relates);
- (d) the authority may rely on evidence of its compliance with its general procedures and any applicable standards for the exercise of its functions as evidence of the proper exercise of its functions in the matter to which the proceeding relates'.

² Great Barrier Reef Intergovernmental Agreement (2009) <http://www.environment.gov.au/marine/gbr/protecting-the-reef/intergovernmental-agreement>

³ John A Church et al, 'Sea level change' in Thomas F Stocker et al (eds), *Climate Change 2013: The Physical Science Basis. Contribution of Working Group I to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change* (Cambridge University Press, 2013) 1137, 1182.

⁴ Xiaoming Wang et al, *Coastal inundation under climate change: a case study in South East Queensland (CSIRO Climate Adaptation Flagship Working paper No. 6)* (2010) CSIRO, 6 <<http://www.csiro.au/files/files/pysz.pdf>>.

This provision recognises that public authorities have necessarily limited resources, and decisions about the allocation of resources are unlikely to give rise to a breach of duty of care. **Crucially, this provision is unlikely to protect a government where funds have already been expended, and extensive sea level rise data has been obtained and mapped.**

Furthermore, section 36 of the CLA states that for the purpose of a proceeding that is based on an alleged wrongful exercise of or failure to exercise a function of a public or other authority (for example, a landholder seeking sue a government authority for allowing development), an act or omission of the authority does not constitute a wrongful exercise or failure *unless* the act or omission was in the circumstances so unreasonable that no public or other authority having the functions of the authority in question could properly consider the act or omission to be a reasonable exercise of its functions.

The reach of section 36 also must not be overstated. The Ipp Report, upon which the CLA was based, intended for this statutory protection to apply only to policy decisions about the performance or non-performance of a ‘public function’.⁵ It was suggested that public functions will be those where the defendant had to balance the interests of individuals against a wider public interest, or consider resource constraints, but the Report declined to provide a definition of the term.⁶ The Ipp Report gave an example of a policy decision versus an operational decision, in relation to road maintenance. If a car accident occurred due to a pothole, the driver may bring an action against a local authority for failing to fix it. If the authority led evidence that it did not know about the pothole, it regularly inspected the roads that it controls, and the pothole arose since the last inspection, this would be a policy decision. However, if the defendant was told about the pothole, and failed to inspect it, or inspected it and decided it was not dangerous, this may be an operational decision, and subject to review.⁷

By analogy, a failure to include sea level rise risk in planning policy, when this risk is well known to government, could be considered an operational decision and therefore not protected by section 36.⁸

Should the changes proceed and litigation against government is pursued, it is ultimately the hardworking people of Queensland who will be paying for the costs of defending such action through taxpayers and rate payers. Future generations will identify that it was the incumbent government in 2014 who chose to take this highly risky step. It is doubtful that any government would wish to leave behind such a legacy.

Recommendation: Sea level rise projections should remain in the CMD maps due to the potential legal liability risks for governments, and ultimately - taxpayers and ratepayers.

⁵ David Ipp et al, *Review of the law of negligence: final report* (September 2002) Commonwealth Treasury, [10.28] <http://revofneg.treasury.gov.au/content/Report2/PDF/Law_Neg_Final.pdf>.

⁶ David Ipp et al, *Review of the law of negligence: final report* (September 2002) Commonwealth Treasury, [10.20]-[10.23] <http://revofneg.treasury.gov.au/content/Report2/PDF/Law_Neg_Final.pdf>.

⁷ David Ipp et al, *Review of the law of negligence: final report* (September 2002) Commonwealth Treasury, [10.31]-[10.33] <http://revofneg.treasury.gov.au/content/Report2/PDF/Law_Neg_Final.pdf>.

⁸ Justine Bell, *Climate Change and Coastal Development Law in Australia* (Federation Press, 2014).

3. Devolution to local governments

Devolving sea level rise planning to local governments will mean a lack of consistency across the state, variations in planning approaches, and conceivably some local governments failing to address sea level rise at all.

The proposal assumes that local governments have the resources to identify, plan and assess sea level rise projections. This is also in the context of local councils coming under increasing pressure from developers to approve development in coastal areas, despite the risks to the community.

It has been recognised that a top-down approach to coastal planning can result in more responsible planning decisions.⁹ Furthermore, providing sea level rise mapping for local governments ensures that both well-resourced and under-resourced local governments are able to fully address these risks in their planning policies and decisions.

<p>Recommendation: The Queensland Government must provide local governments with sea level mapping and guide the development of associated planning policy and assess the impacts on proposed development.</p>

4. The economic imperative to act

The potential legal liability of governments in this area is real, and should not be underestimated. Government should not seek to rely on statutory exclusions of liability, or assumptions that insurance will negate the need for legal challenges.

Insurance is not an appropriate tool to protect against the impacts of sea level rise and flooding. Of the approximately 40 home and contents insurance policies available in Australia, only two policies cover loss or damage caused by actions of the sea.¹⁰ It is likely that the majority of loss or damage caused by gradual sea level rise and storm surge events will be borne by homeowners themselves, not to mention the suffering and anguish of experienced by the future generation of Queenslanders.

Where homeowners are unable to finance this, it becomes a major issue for government. For example, following the flood disaster in Queensland in 2010-2011, it became apparent that many homeowners were under- or un-insured. In such situations, government are subject to intense pressure from the public and the media, and in this instance, many of these repairs were ultimately funded by government schemes, using funds raised through taxation and public donations.

Even if liability is statutorily excluded, experience shows that governments and taxpayers will still pay. Increasing the number of persons and households at risk to inundation is in fact increasing the government's exposure to financial assistance, as well as increasing the emotional burden on Queensland homeowners.

⁹ N Vasey-Ellis, 'Planning for climate change in coastal Victoria' (2009) 27(2) *Urban Policy Research* 157; Schmidt and Morrison, 'Watershed management in an urban setting: process, scale and administration' (2012) 29 *Land Use Policy* 45; Bell et al, 'Maps, laws and planning policy: working with biophysical and spatial uncertainty in the case of sea level rise' (2014) 44 *Environmental Science and Policy* 247.

¹⁰ For a summary of insurance coverage, see Justine Bell, 'Insurance for extreme weather events in Australia – current policy trends, and future directions' (2011) 8 *Macquarie Journal of Business Law* 339.

5. It is contrary to the Great Barrier Reef Intergovernmental Agreement and 2050 Long-Term Sustainability Plan

As this step will result in weaker protection for coastal areas from climate change impacts, it is contrary to the draft Reef 2050 Long-Term Sustainability Plan¹¹ and the Great Barrier Reef Intergovernmental Agreement.¹² Ensuring strong climate change adaptation such as planning for sea level rise, is an essential requirement set out in these two main policies concerning Reef protection:

- 5.1 Climate change is one of the biggest threats facing the Reef.¹³ The Reef 2050 Plan has a specific target in relation to this, which states at CBT4, “Climate change adaptation strategies recognise and avoid adverse impacts on coastal ecosystems essential for Reef health and resilience.” Given that Queensland is proposing to remove sea level rise projections, it means that coastal areas will be less resilient to the impacts of climate change. It also renders the 2050 Plan to be mere rhetoric.
- 5.2 The Intergovernmental Agreement clearly requires the Queensland Government to build and maintain the resilience of the Reef to incorporate climate change considerations in policy programs and management.¹⁴ Fulfilling these obligations will be crucial in ensuring the health of the reef as climate change was identified as the single largest threat to the Reef.¹⁵

Recommendation: The Queensland Government must retain strong planning assessment for sea level rise projections in order to help meet the targets for climate change resilience, as set out in the draft 2050 Plan and the Intergovernmental Agreement.

Should you require any further clarification on issues raised in our submission, please contact Jo Bragg or Rana Koroglu of EDO Qld on (07) 3211 4466.

Yours faithfully,

Environmental Defenders Office (Qld)



Jo-Anne Bragg

Principal Solicitor

¹¹ Draft Reef 2050 Long-Term Sustainability Plan (2014), Commonwealth Department of Environment, available here:

<http://www.environment.gov.au/marine/great-barrier-reef/long-term-sustainability-plan>

¹² Great Barrier Reef Intergovernmental Agreement (2009), available here:

<http://www.environment.gov.au/marine/gbr/protecting-the-reef/intergovernmental-agreement>

¹³ Great Barrier Reef Outlook Report 2014, available here: <http://www.gbrmpa.gov.au/managing-the-reef/great-barrier-reef-outlook-report>

¹⁴ Australian Government: Department of Environment, *Great Barrier Reef Intergovernmental Agreement 2009*, Schedule D.

¹⁵ *Ibid* at p 1.

COVER SHEET

Please attach this **one-page summary** to your submission.

Comments on the proposed coastal management district under the *Coastal Protection and Management Act 1995*.

Submitter details

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a) Privacy statement

The Department of Environment and Heritage Protection is committed to protecting the privacy, accuracy and security of your personal information in accordance with the *Information Privacy Act 2009*.

Your information will be accessed only by authorised personnel to *inform the Queensland Government's final position on the proposed coastal management district*.

This consultation is a public process and any comments you provide may be published in paper copy and/or online and may be transmitted outside of Australia. You may wish to bear this in mind when providing agreement to use or disclose your submission. Your personal information will not be disclosed to any other third parties without your consent or unless authorised or required by law.

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