

SYDNEY COASTAL COUNCILS GROUP



COUNCILS CARING FOR THE COASTAL ENVIRONMENT

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
by the
NSW Environmental Defenders Office





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Executive Summary

Climate change is expected to have significant impacts on local communities in Australia, particularly coastal communities. These impacts include water scarcity, more frequent and intense storms, sea level rise, coastal zone erosion and inundation, the spread of disease and pressure to infrastructure.¹ These impacts are expected to continue into the next century, even with the best emissions reduction scenarios.

It is likely that local governments will shoulder most of the burden of addressing these localised impacts. It is therefore essential that local councils are aware of the scope of their responsibilities; both in statute and common law, to combat climate change, and the potential legal liability faced for inaction. However, it must be acknowledged at the outset that there is considerable uncertainty facing councils. Councils are unsure about the likelihood and severity of climate change risks, which sea level rise scenario to accommodate and whether there are any particular adaptation actions they can take to protect their communities and to shield themselves for any potential liability.

The Environmental Defender's Office has been commissioned by the Sydney Coastal Councils Group (SCCG) to conduct an audit of legislation and policy instruments at all levels of government in Australia to determine the responsibilities and potential liabilities of coastal councils for climate change. The SCCG comprises 15 metropolitan councils in NSW.

There has been a flood of recent changes that affect council responsibilities for climate change in the coastal zone. As of November 2005, the *NSW Coastal Policy*, the government's overarching strategic policy document for the NSW coast, now applies to the greater metropolitan regions of Sydney, Newcastle, the Illawarra and the Central Coast. Also in 2005, the Standard Local Environmental Plan (LEP) was released that contains compulsory zoning descriptions that all councils must adopt. The Standard LEP also requires the mandatory consideration of principles of ecologically sustainable development in assessing development applications in the coastal zone. Councils are expected to complete their new LEPs by 2011. Lastly, as a result of a ministerial direction issued on 19 July 2007, councils must now ensure that their draft LEPs are made in accordance with several recently released regional strategies, in addition to the *NSW Coastal Policy* and the *Coastline Management Manual 1990*. This report will examine this new framework in detail in the context of coastal hazard management for local councils.

This report and its findings apply to all of the NSW Coast, and should serve as a useful tool for the 38 coastal councils in NSW and beyond.

The key findings of the report are as follows:

Statutory Duties

Key Point: Of 137 legislative instruments examined, only 16 make reference to 'climate change', 'greenhouse' or 'sea level rise'.

¹ Jan McDonald, "The Adaptation Imperative: Managing the Legal Risks of Climate Change Impacts" In T. Bonhady & P. Christoff (eds), *Climate Law in Australia*, MUP (forthcoming) at p2.

Key Point: 20 NSW and Commonwealth policies make reference to ‘climate change’, ‘greenhouse’ or ‘sea level rise’.

Key Point: The report has found that there are currently few statutory obligations placed on councils to address climate change. Although provisions were identified that require the consideration of climate change impacts in objects clauses and as matters for consideration, there is currently no requirement to make ‘climate friendly’ decisions. Councils retain significant discretion as long as the correct processes are followed.

Key Point: Policies are non-legal documents that are only given force where their implementation or consideration is required through legislation or ministerial direction. Several government policies have been given legal status in this manner, including the *NSW Coastal Policy*, the *NSW Coastline Management Manual 1990* and various regional planning strategies. These policies contain potential climate change management options and strategies. Councils are now required to ensure that their draft LEPs are consistent with these policies.

Common Law

Key Point: the *Local Government Act 1979* exempts councils from liability for negligence in relation to their activities that relate to flooding and coastal hazards. This applies to the assessment of development applications, the drafting of building standards, the making of Local Environmental Plans, etc. However, there is a requirement for ‘good faith’ which can be satisfied by applying the *NSW Coastline Management Manual 1990*.

Key Point: Whether a duty of care exists is determined by examining the relationship between the relevant parties. Factors of relevance include control, the vulnerability of one of the parties, knowledge of the risk of harm and the closeness of the parties.

Key Point: Councils are likely to owe a duty of care to residents when considering development applications in the coastal zone. To meet this duty of care councils should adopt clear climate change management plans, appropriate building standards, mandatory precautionary conditions and prohibited development zones. The *NSW Coastal Policy* and *Coastline Management Manual* should also be followed. However, the scope of the response expected of an individual council will depend on its resources.

Key Point: Councils are not likely to owe a duty of care in relation to the preparation of environmental planning instruments. However, even if a duty of care does exist councils will be protected as long as they consider appropriate planning and management mechanisms that address climate change impacts when drafting LEPs.

Key Point: a duty of care is unlikely to exist for a council’s failure to act to address climate change risks in the coastal zone. Whether a council conducts particular statutory activities is discretionary, and is dependent on the allocation of resources and council priorities.

Key Point: The *Civil Liability Act 2003* has introduced a new test to determine whether a council has breached its duty of care. A council will breach its duty only if it has acted 'so unreasonably'. This will be quite difficult to establish but councils should still protect themselves by adopting clear policies.

Key Point: to establish negligence it needs to be shown that council action or inaction caused the damage complained of. This will likely be demonstrated for the granting of development consent. However, claimants against councils will have a hard time establishing that preventative action would have prevented the damage inflicted to person or property by climate change.

Key Point: nuisance actions could be brought against councils where the construction of works creates problems for neighbours, or where councils have failed to prevent the effects of climate change. However, such an action is unlikely to succeed because it must be shown that councils had control over the nuisance and that steps could have been taken to prevent it.

Key Point: This report has identified a clear need for state government guidelines to assist councils in setting benchmarks for strategic planning in relation to coastal hazards, and in providing guidance on when and how to conduct adaptive activities that address climate change risks in the coastal zone.

Part A. Introduction

With the threat posed by climate change becoming more pronounced, it is clear that all levels of government must play their part in ensuring that a concerted approach is taken to addressing the potential impacts on the community, the economy and the environment.

Local governments are situated at the ‘coal face’ of the impacts likely to be felt by their constituents, particularly coastal communities. There is an increased realisation that failing to respond adequately to climate change may expose local councils to voter dismay and potential legal liability. However, it is often difficult for local councils to decide how to proceed in responding to the threats posed by climate change. As the *NSW Coastline Management Manual 1990* states, “natural” fluctuations in world climate make it difficult to identify and define any long term trends or localised impacts. Even where prediction has been attempted, e.g. sea level rise, the decision maker is faced with a very large range of choices.² This has left many councils unsure of how to proceed.

This study attempts to alleviate some of this uncertainty for Sydney Coastal Councils Group (SCCG) by identifying the current responsibilities of local councils in relation to climate change. Federal, State and local instruments are examined by locating where the terms “climate change”, “sea level rise” and “greenhouse” appear. Furthermore, the potential liability of councils under the common law, which exists outside of legislation, will be examined.

It is of value to first define the potential sources of responsibilities. In Australia, there are two bodies of law; statutory law and the common law. Statute law refers to the laws passed by parliament. This includes Acts such as the *Environmental Planning and Assessment Act 1979*, regulations and environmental planning instruments. On the other hand, the common law refers to laws made by judges through their interpretation of the law, and through the application of principles developed by courts throughout the ages. Both bodies of law apply in Australia, except where statute expressly abolishes the common law.

Part B provides an examination of council responsibilities under statutory law, NSW government policies and in the consideration of ecologically sustainable development.

Part C provides a review of the potential liability of local councils under the common law of negligence.

Part D contains the overarching conclusions of the report.

The **Appendix** contains a list of all instruments examined in conducting the audit of legislation and also contains excerpts from provisions identified in environmental planning instruments, legislation and government policies.

² *NSW Coastline Management Manual*: Appendix C9. Found at: <http://www.environment.gov.au/coasts/publications/nswmanual/appendixc9.html> (28 August 2007).

GLOSSARY

Statutory Law	Laws made by parliament and set out in legislation such as the <i>Environmental Planning and Assessment Act 1979</i>
Common Law	Law made by judges through their interpretation of legal principles, rather than based on written laws. The common law applies alongside statutory law unless it is expressly abolished.
Salient Factors	The factors that are most relevant in determining whether a duty of care exists. These factors include ‘control’, ‘vulnerability’ and ‘proximity’.
‘So unreasonably’	An action that an ordinary average person would deem unreasonable in the circumstances, or an exercise of a power that is so unreasonable that no reasonable person could have so exercised the power.
Obvious risks	An "obvious risk" to a person who suffers harm is a risk that, in the circumstances, would have been obvious to a reasonable person in the position of that person.
‘Risk averse approach’	An approach that assesses the likelihood of certain risks and takes actions or precautions depending on the likelihood and significance of these risks.
Reasonable foreseeability of harm	Where a reasonable person should have foreseen that there was a likelihood of harm being suffered.
Proximity	A legal term that refers to the degree of closeness of a relationship to help in determining whether a duty of care exists. Generally, the more ‘proximate’ a relationship is, the more likely it is that a duty of care exists.
Closeness	A term used to describe how close a relationship between two parties is. For example, the relationship between ‘teacher’ and ‘pupil’ is said to be a relationship of significant closeness and, as a result, a duty of care is owed by the teacher towards the student.
Good faith	A term to describe a person’s legitimate and honest efforts to meet their obligations in a given situation. It refers to something done honestly, without malice or fraud.
Prima Facie	A Latin term meaning “on the face of it” or “as it appears at first glance”.
Inter alia	A Latin term meaning “amongst other things”.
Precautionary principle	The precautionary principle was defined in Principle 15 of the <i>Rio Declaration (1992)</i> which states: <i>Where there are threats of serious or irreversible environmental damage, lack of full scientific certainty should not be used as a reason for postponing measures to prevent environmental degradation.</i>

Part B - Statutory obligations

It is important at the outset to set out the coastal zone management framework as it currently stands in NSW to provide the statutory and policy context for the report.

1. Coastal zone management framework in NSW

There are a myriad of laws, regulations and policies that potentially apply to a council's activities in the coastal zone.³ It is therefore imperative that councils are fully aware of their responsibilities under these legal instruments.

The legislative framework provides councils with significant scope to respond to coastal issues such as climate change. Much of the day to day management associated with beaches, coastal areas and land use planning reside with local government. Local councils are responsible for local environmental planning and development approval under the *Environmental Planning and Assessment Act (1979)*, the preparation of Coastal Zone Management Plans under *the Coastal Protection Act (1979)*, as well as the management of community land, including most beaches under the *Local Government Act (1993)*. However the State also has clear responsibilities in policy/planning, natural resource management, as well as emergency management. An analysis of the state government's responsibilities is beyond the scope of this paper.

The coastal zone management frame work in NSW comprises four main aspects. First, there is legislation that applies, such as the *Coastal Protection Act 1979*. Second, government policies are applicable such as the *Coastal Policy 1997* and the *Coastal Hazards Policy 1988*. Third, there are planning mechanisms available, like the process outlined in the *Coastline Management Manual 1990*. Lastly, there are state government funding and advice programs such as the Coastal Management Program.

The Coastal Protection Act 1979

The *Coastal Protection Act 1979* is the principal piece of legislation that applies to the NSW coastal zone. It aims to provide for the protection of the coastal environment of the State "for the benefit of both present and future generations".⁴ This Act 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 the Coastal Zone Management Plans. The coastal zone was extended in 2005 and now also applies to the greater metropolitan regions of Sydney, Newcastle, the Illawarra and the Central Coast.

The Act prohibits a public authority from authorising or carrying out development in the coastal zone, without the consent of the Minister, if the Minister is of the opinion that the development:

- is inconsistent with principles of ecologically sustainable development

³ For an extensive discussion of the coastal management framework in NSW please see Bruce Thom, "Beach protection in NSW: New measures to secure the environment and amenity of NSW beaches" (2003) 20 *EPLJ* 325.

⁴ Section 3, *Coastal Protection Act 1979*.

- adversely affects the behaviour of the sea or an arm of the sea or any bay, inlet, lagoon, lake, body of water, river, stream or watercourse; or
- adversely affects any beach or dune the bed, bank, shoreline, foreshore or flood plain of the sea or an arm of the sea or any bay, inlet, lagoon margin, lake, body of water, river, stream or watercourse.⁵

Furthermore, the Act allows for the making of Coastal Zone Management Plans. Such plans must address the following three things:

- the protection and preservation of the beach environment and beach amenity;
- emergency action to be taken during periods of beach erosion; and
- continuing and undiminished public access to beaches and waterways.

The preparation of a Coastal Zone Management Plan is currently discretionary, unless the Minister directs a council to prepare a plan. However, it is prudent for a council to prepare such a plan even in the absence of a ministerial direction as it enables a strategic approach to be taken in responding to climate change impacts within the coastal zone.

State Environmental Planning Policy No 71 - Coastal Protection

State Environmental Planning Policy No. 71 regulates development in New South Wales coastal areas. The policy prohibits certain types of development in the coastal zone.

A consent authority must reject development applications that will diminish access to coastal foreshores, result in effluent that negatively affects water quality, or involve discharge of stormwater into the sea, a beach, coastal lake, creek or rock platform. The Policy also requires that a master plan be adopted by the Minister for certain developments before consent can be given. These include subdivisions in sensitive coastal areas.

Finally, SEPP 71 requires councils to take certain matters into account when deciding whether to grant consent to a development application or when drafting an environmental planning instrument in the coastal zone. Of most relevance to climate change, councils must take into account “the likely impact of coastal processes and coastal hazards on development and any likely impacts of development on coastal processes and coastal hazards”.

State Environmental Planning Policy (Major Projects) 2005

This policy has incorporated several provisions that were previously found in SEPP 71. The Policy applies to the whole state which includes the metropolitan region. The Policy aims, amongst other things, to identify development to which the development assessment and approval process under Part 3A of the *Environment Planning & Assessment Act 1979* applies.

The Policy declares that Part 3A projects are those developments which are, in the Minister's opinion, of a kind described in Schedules 1, 2, 3 and 5 of the Policy. Schedule 2 deals specifically with coastal areas. The Policy declares that certain projects within the coastal zone are Part 3A projects, which means that the Minister is the consent authority for the project and that the project is exempt from the environmental assessment

⁵ Section 38, *Coastal Protection Act 1979*.

provisions of the *Environmental Planning and Assessment Act 1979*. Schedule 2 developments include extractive industries, mining and landfill activities. The result of this Policy is that developments that are likely to have the greatest impact on the coastal environment in NSW will be decided by the Minister for Planning.

Standard Local Environmental Plan

The NSW Government introduced the standard LEP template in 2006 to standardise LEPs across the state. Local councils in NSW are now required to prepare a new LEP for their area in accordance with the standard instrument. All 152 councils will have completed their standard LEPs by 2011, with the first of these being made in 2008.

The Standard LEP introduces standard terms and definitions as well as standard zones that will apply throughout NSW. Furthermore, it contains several mandatory provisions that will apply within the coastal zone. Under Regulation 32, a council must recognise and accommodate coastal processes and climate change in its consideration of development in the coastal zone. Specifically, a council can not grant consent to a development unless it has considered, *inter alia*, the effect of coastal processes and coastal hazards, including sea level rise, on the development. Mandatory consideration provisions will be discussed in detail below.

NSW Coastal Policy 1997

The principal policy guiding councils in the coastal zone is the NSW *Coastal Policy 1997*. The aim of the policy is to promote ‘the ecologically sustainable development of the New South Wales coastline’. This is in recognition of the fact that the coastal zone is subject to intense pressures from human activity and that there are a large range of competing interests for its resources. The Policy aims to facilitate the development of the coastal zone in a way which protects and conserves its values. This includes recognising and accommodating natural processes and protecting beach amenity and public access.

The Policy sets out various goals, actions and objectives. The key strategic action outlined in the policy is the development and implementation of Coastal and Estuary Management Plans in accordance with the existing Coastline and draft Estuary Management Manuals. The NSW Coastal Policy will be discussed in further detail below.

NSW Coastline Hazard Policy

In June 1988 the NSW Government adopted the *Coastline Hazard Policy*. The Policy involved, amongst other things, the provision of financial and technical assistance to local government, the production of the *Coastline Management Manual 1990*, and amendment to the *Local Government Act 1993* to provide councils with immunity from liability in respect of advice provided or acts done in good faith in respect of coastline hazard matters, provided that councils follow the principles set down in the Manual.

The primary objective of the *Coastline Hazard Policy* is to reduce the impact of coastal hazards on individual owners and occupiers, and to reduce private and public losses resulting from natural coastal forces.

The Policy sets out certain actions take can be taken to address coastal hazards. First, the impact of coastal forces on existing developed areas shall be reduced by works and measures and by the purchase of property on a voluntary basis, where appropriate.

Second, the potential for coastal damage in respect of any proposed coastline development shall be addressed through the application of effective planning and development controls by local councils. Lastly, a merits approach to all development and building decisions should be adopted which takes account of social, economic and ecological as well as oceanic process considerations.

The NSW Coastline Management Manual 1990

The Coastline Management Manual was prepared as part of the implementation of the *Coastline Hazard Policy*. The Manual was created to facilitate a sound understanding of coastal processes/hazards in NSW and their underlying causes. It assesses and identifies all available management options against environmental, social and economic criteria. It also provides detailed guidelines for councils to follow to address coastal erosion issues.

The Manual also outlines a series of steps to prepare and then implement Coastline Management Plans, as well as other adaptive actions councils can take to address coastal hazards.

Moreover, under the *Coastal Protection Act 1979* councils that are located in the coastal zone may produce Coastal Zone Management Plans, and must do so if directed by the Minister. The Act requires that these plans must be made in accordance with the Coastline Management Manual. Therefore councils would be unwise not to adhere to the Manual when making their Coastal Zone Management Plans as this may be a breach of their obligations under the *Coastal Protection Act 1979*.

As part of the Coastal Protection Package announced in 2001, Cabinet requested that a new Coastal Zone Management Manual be prepared to combine and revise the existing Coastline and Estuary Management Manuals. This new manual is not expected until 2008-2009.

The Coastal Management Program

The NSW Government supports the coastal management planning process through the Coastal Management Program. It aims to enhance the amenity of the NSW coastline and to protect infrastructure from coastal hazards in an ecologically sustainable manner.

Under the Program, which is administered by the Department of Environment and Climate Change, the government provides funding to local councils on a 50:50 basis for the preparation of Coastal Zone Management Plans. The Program also provides funds toward the implementation of management plans including mitigation works to address coastal hazard problems or coastal amenity enhancement.

Furthermore, specialist technical advice is provided to local government addressing coastal processes/hazards and coastal management. This includes representation on Coastal Management Committees, and the provision of technical/specialist advice as required.

In order to address climate change risks in their areas, coastal councils should make full use of this program as it provides them with resources and expertise in the development of their Coastal Zone Management Plans.

2. Statutory provisions identified

The clauses identified in Section 2.1.1 of the Appendix may be divided into four categories - objects clauses, mandatory considerations, Commonwealth and NSW legislation and government policies.

2.1. Objects clauses

The provisions identified in Section 2.1 of the Appendix contain references to ‘climate change’, ‘greenhouse’ and ‘sea level rise’ within objects clauses of environmental planning instruments. In most of these cases, climate change is one of a list of numerous objects - in no case is addressing climate change expressed as being the overriding objective.

The objects of legislative instruments, or more specifically identified zones in an LEP, are 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.

Hence, the objects of legislation can be useful when the Court is interpreting provisions in local environmental plans or otherwise.

On the other hand, the Land and Environment Court has stopped short of requiring strict compliance with the objects of legislation, especially where they are varied and inherently inconsistent. Hence, references to climate change in the objects clauses of various provisions in LEPs place minimal, or no, express obligations on councils in terms of positive obligations and duties. Any prescriptive obligations in legislation will always take precedence. For example, although Clause 32(1) of the Standard LEP lists as one of its objects to ‘recognise and accommodate coastal processes and climate change’, it is Clause 32(2) (which will be discussed below) that actually requires councils within the coastal zone to consider climate change in decision-making, not the objects. However, if the Court finds ambiguity in these provisions, they will look to the objects clause for guidance on how to interpret them.

In summary, the objects clauses identified in the audit do not directly affect decision-making for coastal councils. There are no provisions in these LEPs that direct decision-makers to have regard to the objects when making decisions, such as assessing development applications. Moreover, even where objects clauses must be considered, it is up to the individual decision-maker to determine which object is to take precedence in the particular circumstance. This is particularly the case where the objects are stated as being of equal weight, or where objects are not prioritised. In the case of *Minister for Urban Affairs & Planning v Rosemount Estates P/L & Ors Planning* (1996) the Supreme Court of NSW, in interpreting the objects set out in section 5(a) of the *Environmental Planning and Assessment Act 1979* held:

Planning involves the making of choices between alternatives suggested by the conflicting objects in s 5 (a). These include the proper development and conservation of natural resources, the promotion of the economic use and development of land, and the protection of the environment. The working out of these conflicting objects in a given policy, plan or decision will inevitably present to a legislative planner or decision-maker a range of choices within the scope of any power.

Hence, councils maintain significant discretion in applying objects clauses. The situation would be different where an LEP states that development consent may only be granted where the development is not inconsistent with the objects of the Plan. However, none of the objects clauses identified are of this nature.

Summary: objects clauses place no substantive obligations on councils to take positive actions to address climate change, but will assist the court in interpreting obligations found in other provisions of LEPs.

2.2. Relevant considerations

The provisions set out in Section 2.1.2 of the Appendix contain references to ‘climate change’, ‘greenhouse’ and ‘sea level rise’ in provisions setting out procedures for development assessment. These provisions require, as a pre-condition to the granting of consent, that the relevant council must take into account various considerations, or “have regard” to certain matters.

It has long been established by the Land and Environment Court that where no weight is ascribed to the matters to be considered, it is left to the discretion of the decision-maker to decide which considerations to favour in the ultimate ‘weigh up’. For example, in *Minister for Aboriginal Affairs v Peko-Wallsend Ltd (1986)* it was said:

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” conducted by councils in reaching their decisions. However, although the courts do not intrude upon the merits of a decision, councils must demonstrate that each of the mandatory considerations *are* in fact considered prior to the final decision being made. If some 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)*)⁶.

In the case of *Weal v Bathurst*⁷, it was held that a council must properly inform itself about all relevant matters. That is, there must be real consideration of the mandatory matters, not simply a tokenistic reference to them. Therefore, as long as the councils can demonstrate that due regard was had to the likely impacts of climate change, and to potential conditions that could be imposed to alleviate future impacts, then councils would have discharged their responsibilities to take ‘climate change’ into account. There is therefore no requirement to actually make decisions that are “climate-friendly”. For

⁶ 47 LGRA 319

⁷ (2000) 111 LGERA 181

example, ‘due regard’ might be demonstrated by showing that expert studies or environmental impact statements were required by council to examine the relevant issues, public forums were held, councillors discussed the relevant issues in chambers as evidenced by council minutes, appropriate conditions of consent were imposed, responses were made to address issues identified in public submissions etc. This sort of action demonstrates that real regard was had to the issues for consideration, as opposed to a mere ‘tick a box’ approach.

It is worth noting that manifestly unreasonable decisions will not be protected, even where councils can show that they considered all relevant matters.⁸ This ground of review has traditionally been quite difficult to establish and the courts have made it clear, that it only applies in exceptional circumstances to overturn grossly unreasonable decisions.

Summary: provisions requiring councils to give due regard to climate change factors can be met by considering climate change in a genuine and substantive manner. However, the weight to be given to these considerations remains within councils’ discretion.

2.3. Commonwealth and State legislation

The provisions identified in Section 2.2 of the Appendix are references to ‘climate change’, ‘sea level rise’ and ‘greenhouse’ in NSW and Commonwealth legislation. None of the climate change provisions identified place any direct obligations on local councils.⁹ A short summary of each is provided.

The *Environment Protection and Biodiversity Conservation Act 1999 (Cth)* provisions allow the Commonwealth to make regulations to give effect to the United Nations Framework Convention on Climate Change.

The *Electricity Supply Act 1985* establishes and regulates the electricity supply system in NSW. It aims to establish a competitive retail market in electricity so as to promote the efficient and environmentally responsible production and use of electricity and to deliver a safe and reliable supply of electricity. In relation to climate change, the Act was amended in 1998 to create the NSW Greenhouse Gas Abatement Scheme (GGAS). The scheme establishes State greenhouse gas benchmarks and individual greenhouse gas benchmarks for the reduction of greenhouse gas emissions that are to be met by retail suppliers, market customers and certain other persons who supply or consume electricity.

The *Energy and Utilities Administration Act 1987* establishes the Energy Corporation of NSW. The Corporation’s role is to provide advice to the government and to the community on energy matters and their coordination. A further role is to promote energy conservation and measures to increase the efficiency of energy supply, transmission and use. The Act was amended in 2007 to establish the Climate Change Fund. The purpose of this fund is to provide funding for energy saving and water recycling projects.

⁸ *Associated Provincial Picture Houses v Wednesbury Corporation* (1948) 1 KB 227.

⁹ Councils may of course have obligations under these Acts that are not relevant to climate change. For example in considering works under the *Water Management Act 2000* councils have certain referral obligations.

The *Renewable Energy (Electricity) Act 2000 (Cth)* relates to the mandatory renewable energy scheme that requires certain installations, such as power stations, to source a certain percentage of their energy from renewable sources.

The *National Greenhouse and Energy Reporting Act 2007* provides a framework for the reporting of greenhouse gas emissions, greenhouse gas projects, energy production and energy consumption by companies and facilities that emit above certain thresholds. It is designed to link in with the upcoming Australian Emissions Trading Scheme.

The *Threatened Species Conservation Act 1995* lists climate change as a key threatening process which requires the Department of Environment and Climate Change to take action to address this threat, but no Threat Abatement Plan has yet been developed.

The *Water Management Act 2000* establishes a compensation framework to compensate water users when their water allocations have to be reduced. Where such reductions are made to respond to the effects of climate change, no compensation is payable.

<p>Summary: only 7 pieces of Commonwealth and NSW legislation mention climate change.</p>
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3. Policies

The provisions identified in Section 2.3 of the Appendix are references to ‘climate change’, ‘sea level rise’ and ‘greenhouse’ in government policies. Generally, policies do not have statutory force and are therefore legally unenforceable. However, it has been held in relation to the *Environmental Planning and Assessment Act 1979* that policies are still relevant in consideration of the public interest and a consent authority is entitled to have regard to them in making value judgments.¹⁰ Furthermore, several policies must be applied as a result of legislation and/or ministerial direction.

The *NSW Coastal Policy 1997* must be implemented by local councils in two circumstances. First, as a result of a section 117 direction, Local Environment Plans must be consistent with, and give effect to, the *NSW Coastal Policy 1997*. Second, as required by the *Environmental Planning and Assessment Regulation 2000*, the *Coastal Policy* is a mandatory relevant consideration when assessing development applications. It is required to be considered in the same way as all other considerations.

Currently, the only prescriptive requirement under the *Coastal Policy* that is directly relevant to climate change is the need to implement appropriate planning mechanisms that incorporate sea level change scenarios set by the Inter-governmental Panel on Climate Change (IPCC). A literal interpretation of this requirement is that as long as an LEP incorporates the consideration of climate change impacts into the assessment of development applications, then this requirement would likely be discharged because “appropriate planning mechanisms” have been put in place. However, there are practical difficulties faced by councils in complying with this requirement. First, councils are given no guidance as to which specific IPCC sea level scenarios they need to incorporate, nor the time frame for implementation. Second, many existing environmental planning instruments are not flexible enough to allow for an adaptive response to changing sea level rise. As a result, LEPs will in some cases need to be substantially amended and

¹⁰ *Terrace Tower Holdings P/L v Sutherland Shire Council* (2003) 129 LGERA 143.

modified to comply with the *Coastal Policy*. These new or amending LEPs can take years to finalise. Lastly, the Coastal Policy does not address the indirect impacts of sea level rise, such as increased storm surges and groundwater intrusion. The impacts of such events can be impossible to predict.

Moreover, in accordance with the precautionary principle the *Coastal Policy* also requires that a risk averse approach be taken to decision making which is particularly relevant to the issue of coastal hazards. However no guidance is provided as to what a 'risk averse' approach entails. Despite this lack of guidance, councils will go a long way to achieving a 'risk averse approach' by putting into place a development assessment framework that implements the precautionary principle. This can be done through the use of legislative tools such as Coastal Zone Management Plans and also by prohibiting or limiting development in the coastal zone where the risks posed by climate change are particularly great or uncertain.

Although there is considerable uncertainty faced by councils, as long as a council can demonstrate that it has made a genuine, 'good faith' attempt to incorporate the Coastal Policy into its planning mechanisms, then it will likely meet its obligations under the *NSW Coastal Policy*. Such an effort will also provide councils with a possible protection from liability for negligence under Section 733 of the *Local Government Act 1993*. (Please note that this notion of 'good faith' is further examined under Part C (Potential Common Law Liability) of this document).

It is important to also note that a failure to comply with a ministerial direction will not necessarily invalidate an Environment Planning Instrument. Under s117(5), an LEP cannot be challenged, reviewed or called into question on the basis that a council has not complied with a 117 direction. Therefore, once an LEP has been made it cannot be challenged on the basis that it did not adequately implement the *NSW Coastal Policy*.

Coastline Management Manual 1990

The *NSW Coastline Management Manual* is a policy document setting out means by which a council can adequately manage its coastline. As a result of new section 117 directions issued on 17 July 2007, the *Coastline Management Manual 1990* is now of increased importance. Similar to the *NSW Coastal Policy*, a council is now required to ensure that its draft LEPs include provisions that give effect to, and are consistent with, the *NSW Coastline Management Manual*.

Also, under the *Local Government Act 1993* councils are afforded an exemption from liability for negligence where they have acted substantially in accordance with the principles contained in *Coastline Management Manual*. This is discussed in detail in **Part C**.

NSW Biodiversity Strategy

The *NSW Biodiversity Strategy* is a strategic NSW Government document that attempts to address, amongst other things, the potential impacts of climate change on biodiversity and threatened species. It outlines activities such as further research into impacts on flora and fauna, improved monitoring and conservation strategies. However, it places no direct obligations on local councils.

NSW Greenhouse Plan

The NSW Government's Greenhouse Plan was released in November 2005. The plan is intended to provide a strategic approach to combating climate changes in NSW. The plan's implementation is overseen by the NSW Greenhouse Office, which is now part of the Department of Environment and Climate Change. The Plan recognises that in order to limit global warming impacts now and for future generations, immediate and sustainable action to limit greenhouse gas emissions is needed. The key principles and goals of the Greenhouse Plan are to:

- Raise awareness of climate issues within the broader community
- Recognise that climate change is a global, long term and complex issue with no easy solution
- Promote understanding of the likely impacts on NSW, and identify strategies for adaptation to the environmental, social and economic impacts of climate change
- Limit the growth of greenhouse gas emissions and reduce these emissions in NSW. The Plan outlines targets, strategies and actions to achieve significant emission reductions
- Promote climate change partnerships through co-operative approaches by Government, individuals, industry, business and community groups
- Reduce business uncertainties by establishing carbon constraints in order to promote new investment and innovation
- Identify key strategic areas for cooperative work with other Australian jurisdictions including the development and establishment of a Kyoto compliant national emissions trading scheme.

The NSW Greenhouse Plan outlines strategic actions to limit greenhouse emissions in NSW, and achieve key emission reduction targets. It includes initiatives on energy efficiency, transport, waste, industrial processes and agriculture. In relation to coastal hazards the plan suggests research be conducted on likely coastal impacts and on the feasibility of a coastal adaptation program. In particular it states:

Research on the likely impact of climate change on coastal erosion and inundation will identify assets at risk and facilitate the consideration of a range of management options. One option could be the establishment of a nationally coordinated coastal adaptation program to be pursued through NSW participation in the National Disaster Mitigation Program.¹¹

The plan is intended to be a strategic policy document. It places no direct legal responsibilities on local councils.

National Greenhouse Strategy

The *National Greenhouse Strategy* is a policy document that was developed by the Commonwealth and State Governments in 1998, with input from local government, industry and the community. The aims of the strategy are:

- To limit net greenhouse gas emissions, and to meet Australia's international commitments.

¹¹ NSW Greenhouse Plan. Found at: http://www.greenhouse.nsw.gov.au/data/assets/pdf_file/0016/2662/28-11_FINAL_NSW_GH_Plan_web.pdf (20 December 2007).

- To foster knowledge and understanding of greenhouse issues.
- To lay the foundations for adaptation to climate change.

To achieve these goals the strategy provides a broad set of actions some of which will be implemented by governments acting individually, some by joint intergovernmental initiatives and some through partnerships between government, various stakeholders and the community.

Of most relevance to the current report, the strategy sets adaptation strategies for the coastal zone. These are:

- encouraging the adoption of planning strategies which take into account possible climate change impacts, including sea level rise (based on best available climate change and impacts modeling);
- assisting local governments in assessing the vulnerability of local coastal areas to possible climate change impacts and in developing appropriate response strategies;
- encouraging awareness and improved management of potential hazards arising from climate change;
- enhancing the capacity to monitor environmental change in the coastal zone to improve coastal management in response to climate change.

The responsibility for pursuing these strategies lies with the NSW Government, in collaboration with local government. However, the strategy has no legislative force. It therefore imposes no direct obligations or responsibilities on local councils to undertake action to combat climate change risks in the coastal zone. Nonetheless, it provides useful guidance to councils on the appropriate approach to be taken.

NSW Metropolitan Strategy

The *NSW Metropolitan Strategy*, ‘City of Cities’ is a State Government document setting out metropolitan priorities and broad strategies by which they can be achieved. In terms of climate change, it aims to increase renewable energy and reduce greenhouse gas emissions. The Strategy imposes no direct obligations on local councils.

Sub-regional strategies

To achieve the objects in the Metropolitan Strategy's ‘City of Cities’ ten sub-regional strategies will be implemented by the NSW Government. Sub-regional strategies will be designed to translate the Metropolitan Strategy to a local level. The ten sub-regions are:

- Sydney City Subregion (City of Sydney LGA)
- East Subregion (Botany Bay, Randwick, Waverly, Woollahra LGAs)
- South Subregion (Kogarah, Hurstville, Canterbury, Rockdale, Sutherland, Marrickville LGAs)
- Inner West Subregion (Ashfield, Burwood, Canada Bay, Leichhardt, Strathfield LGAs)
- Inner North Subregion (Lane Cove, North Sydney, Ryde, Willoughby, Hunters Hill, Mosman LGAs)
- North Subregion (Hornsby, Ku-ring-gai LGAs)
- North East Subregion (Pittwater, Warringah, Manly LGAs)

- West Central Subregion (Auburn, Bankstown, Fairfield, Holroyd, Parramatta LGAs)
- North West Subregion (Baulkham Hills, Blacktown, Blue Mountains, Hawkesbury, Penrith LGAs)
- South West Subregion (Wollondilly, Camden, Campbelltown, Liverpool LGAs)

As at December 2007, only 6 draft strategies have been prepared.¹² These are likely to be finalised in 2008.

Unlike regional strategies, which are discussed below, these sub-regional strategies have no statutory force, either through legislation or ministerial direction. They are at this stage only policy documents that place no direct obligations on councils. However, it has been made clear by the Department of Planning that sub-regional plans should be used as an aid in strategic planning for local councils. Therefore, it is possible that LEPs may be required to be made in accordance with these sub-regional strategies in the future.

NSW State Plan

The NSW State Plan was released in 2007. The plan focuses on 5 areas of activity by the NSW State Government. These are:

- Rights, Respect and Responsibility – the justice system and services that promote community involvement;
- Delivering Better Services – such as better health, education and transport;
- Fairness and Opportunity – services that promote social justice and reduce disadvantage;
- Growing Prosperity Across NSW – activities that promote productivity and economic growth, particularly in rural and regional NSW ;
- Environment for Living – planning for housing and jobs, environmental protection, arts and recreation.

The State Plan sets out the goals that the NSW Government will work towards and identifies priorities for government actions over the next ten years. In terms of climate change, the Plan outlines the NSW's greenhouse gas target of a return to year 2000 greenhouse gas emission levels by 2025 and a 60 per cent cut in greenhouse emissions by 2050.

The NSW State Plan is not of direct relevance to local councils. Its aim is to set out state government initiatives and actions over the next 10 years. It does not suggest any actions to address sea level rise or coastal hazards resulting from climate change.

Regional strategies

Regional strategies are strategic policy documents that were introduced in 2007. They are of considerable importance. This is because the NSW Government intends to focus on these regional strategies as alternatives to Regional Environmental Plans. In this vein, several regional strategies have recently been given quasi-legal status through *Ministerial Direction No 30*. This direction requires councils to ensure that their LEPs are consistent with the relevant regional strategy. Specifically, the direction makes it clear that councils must implement the vision, land use strategy, policies, outcomes and actions of a regional

¹² Drafts for Sydney City, Inner West, West Central and North West will be forthcoming in 2008.

strategy when preparing a draft LEP.¹³ The direction currently applies to the following four regional strategies:

- Lower Hunter
- North Coast – Far North
- Southern Region – Illawarra
- Southern Region – South Coast

Several other regional strategies are still in the draft stage and it is likely they will be subject to similar directions once they are finalised.

All four of the above regional strategies contain references to climate change and prescribe actions to be taken in response to climate change impacts. For example, the Far North Coast Regional Strategy requires councils to undertake investigations of lands that will potentially be affected by sea level rise and inundation. Similarly, the South Coast Regional Strategy requires LEPs to make provisions for adequate setbacks in areas of coastal erosion risk and ocean-based inundation.

An in-depth analysis of the references to climate change in these regional strategies, and the obligations they place on councils, is beyond the scope of this paper. However, it is important for the councils covered by these policies to be mindful of their obligation to ensure that their draft LEPs are consistent with the regional strategies and in particular, to apply those provisions that require the implementation of relevant climate change actions. If a draft LEP is significantly inconsistent with a regional strategy, the Minister may refuse to give it final approval. Furthermore, the Minister can now take planning powers away from councils if he is of the opinion that the council has failed to comply with its obligations, which include the making of LEPs consistent with regional strategies.

Summary: Policies are non-legal documents that are only given force where their implementation or consideration is required through legislation or ministerial direction. Several government policies have been given legal status in this manner, including the *NSW Coastal Policy*, the *NSW Coastline Management Manual 1990* and various regional planning strategies. Councils are required to make their LEPs consistent with these policies.

4. Ecologically Sustainable Development

It is important for councils to be aware that the consideration of climate change impacts may be implicit in the consideration of ESD. For example, Clause 32 of the Standard Local Environmental Plan, which is mandatory in the coastal zone, requires the protection of the coastal environment through promoting the principles of ecologically sustainable development. Ecologically Sustainable Development (ESD) is an internationally recognised concept that requires the integration of economic, social and environmental considerations into decision-making processes. The principles of ESD

¹³ The direction can be seen in full on the Department of Planning website at the following link: <http://www.planning.nsw.gov.au/planningsystem/local.asp> (20 December 2007).

most relevant to climate change impacts are the precautionary principle¹⁴ and the principle of inter-generational equity.

Although ESD is not expressly required to be considered by councils and/or Minister for Planning when assessing a development application under the *Environmental Planning and Assessment Act 1979*, several Land and Environment Court decisions in NSW have established that ESD must be considered by councils and when having regard to the 'public interest'.¹⁵ For example, in the case of *Gray v Minister for Planning (2006)* a decision by the Director-General to accept the proponent's environmental assessment for a large coal mine at Anvil Hill in NSW was quashed due to the Director-General's failure to consider the offshore burning of coal and principles of ESD. Justice Pain accepted that in determining whether the environmental assessment was adequate, the Director-General was required to consider ESD by virtue of the objects of the Act and because the Director-General is required to Act in the public interest.¹⁶

The following case study, *Walker v Minister for Planning (2007)*, highlights the need for consent authorities to consider the impacts of climate change on coastal developments through their consideration of the principles of ESD.

Case study: *Walker v Minister for Planning (2007)* NSWLEC 741.

This case involved a successful appeal against a decision by the Minister for Planning to approve a concept plan for a project to subdivide land at Sandon Point in order to construct a retirement development. The ruling is likely to have significant implications for future development in coastal areas that are potentially subject to increased flooding and sea level rise as a consequence of climate change.

Justice Biscoe found that the Minister for Planning had failed to consider ESD by failing to consider whether the impacts of the proposed development would be compounded by climate change. In particular, the Minister failed to consider whether potential flooding associated with climate change may impact the land at Sandon Point, which is located on flood prone land.

After finding that climate change was a deadly serious issue involving risk to the survival of the human race and other species, he concluded:

"In my opinion, having regard to the subject matter, scope and purpose of the EPA Act and the gravity of the well-known potential consequences of climate change, in circumstances where the Director-General's report (nor any other document before the Minister) appeared to have considered whether climate change flood risk was relevant to this flood constrained coastal plain project, the Minister was under an implied obligation to consider whether it was relevant and, if so, to take it into consideration when deciding whether to approve the concept plan. The Minister did not discharge that function."

Although this case was considered under Part 3A and not under Part 4, it is nonetheless indicative of a recent trend in the Land and Environment Court towards climate change and coastal hazards. The Court has made it clear that consent authorities will be required

¹⁴ The precautionary principle was defined in Principle 15 of the *Rio Declaration (1992)* which states: *Where there are threats of serious or irreversible environmental damage, lack of full scientific certainty should not be used as a reason for postponing measures to prevent environmental degradation.*

¹⁵ See for example *Telstra Corporation v Hornsby Shire Council (2006)* NSWLEC 133.

¹⁶ *Gray v Minister for Planning (2006)* NSWLEC 720.

to demonstrate that real regard was had to principles of ESD and to climate change impacts. As a result of this decision, councils should assume that there is the potential for greater flooding and inundation as a result of climate change in the coastal zone when considering coastal developments and take this into consideration. Councils must be able to demonstrate that they have taken into account the potential impacts that sea level rise and climate change on the proposed development and whether any mitigation measures could be put in place to lessen any future flooding impacts.

**We note that the decision is being appealed by the Department of Planning.*

Part C - Potential Common Law Liability

The previous section has established that there is currently no mandatory statutory duty placed on coastal councils to conduct activities that reduce or address the effects of climate change. Councils are given significant discretion as to how and when to conduct certain statutory activities. However, the absence of a statutory duty does not mean that councils do not have a *common law duty* to combat these risks. The law imports a duty of care in certain circumstances. This is primarily through the law of negligence which will be examined below. However, it must be said at the outset that the *Local Government Act 1993* and the *Civil Liability Act 2003* provide protection from liability which significantly affect the common law duties. These will be examined first.

1. Statutory Exemptions

1.1. *Local Government Act 1993* exemptions

A seemingly complete protection from liability is provided in the *Local Government Act 1993*. Section 733 exempts councils from liability in two circumstances:

- (a) in respect of advice furnished, action taken, or anything done or omitted to be done which relates to *flooding* provided that the decision was taken in good faith; and
- (b) in respect of advice furnished, action taken, or anything done or omitted to be done which relates to *natural hazards in the coastal zone*, provided that the decision was taken in good faith.

Section 733(2) is relevant to climate change as it relates to natural hazards in the coastal zone, which would include sea level rise, swells, storm surges, etc. *Prima facie*, this provision eliminates the likelihood of negligence claims against councils relating to climate change impacts. This position is even stronger when section 733(3) is examined. It stipulates:

(3) Without limiting subsections (1) and (2), those subsections apply to:

- (a) the preparation or making of an environmental planning instrument or development control plan, or the granting or refusal of consent to a development application, or the determination of an application for a complying development certificate, under the Environmental Planning and Assessment Act 1979, and*
- (c) the imposition of any condition in relation to an application referred to in paragraph (a), and*
- (d) advice furnished in a certificate under section 149 of the Environmental Planning and Assessment Act 1979, and*
- (e) the carrying out of flood mitigation works, and*
- (f) the carrying out of coastal management works, and*
- (g) any other thing done or omitted to be done in the exercise of a council's functions under this or any other Act.*

Therefore, councils will incur no liability for the making of LEPs, the assessment of development applications, the imposition of conditions, the carrying out of works, or for a failure to conduct adaptation, etc. These relate to precisely the types of council actions that relate to climate change. However, despite the apparent immunity from liability granted to councils by this provision, there is nevertheless a requirement that actions be undertaken 'in good faith'. Subsection 4 states that good faith is assumed if the council

acts in accordance with the *Coastline Management Manual 1990*, unless the contrary is proven.

It is important to note that a court will not assume an absence of ‘good faith’ simply because a council’s negligence has led to damage. The protection afforded to councils in section 733 does not involve an examination of the *outcome* of the relevant council action (or inaction). Instead, the court will be most interested in whether the *process* by which a development was approved (for example) was conducted in ‘good faith’.

‘Good faith’ can be demonstrated by a council if it can show that it has acted in accordance with the *Coastline Management Manual*. If it follows the processes contained therein, it will be protected from liability. In relation to climate change and coastal hazards, the *Coastline Management Manual* requires:

Having considered the range of management options which might be applied to an area, and before attempting to make a final selection of the most appropriate, the impact of likely variations in assumptions made and of possible climatic changes should be considered. The sea level rise that might accompany atmospheric changes is the most discussed but is only one of a number of uncertain factors that might affect the implementation of a particular management strategy. In respect of climate change there is no current engineering basis for the adoption of a particular scenario, but the effects of any chosen scenarios can be assessed.

The Manual also sets out hazard management options that councils can take in addressing coastal hazards when exercising its various functions.¹⁷ These are set out below;

Hazard Management Options	
Category	Management Option
Environmental Planning	<ul style="list-style-type: none"> Buffer Zones Restrictive Zoning Planned Retreat Voluntary Purchase
Development Control Conditions	<ul style="list-style-type: none"> Building Setback Building Types Dune Protection Flood Mitigation Foundation Design Emergency Access Relocatable Buildings Planned Retreat
Dune Management	<ul style="list-style-type: none"> Dune Management Planning Community Involvement Dune Reconstruction Dune Revegetation Dune Protection Dune Maintenance

¹⁷ It is beyond the scope of this paper to provide a complete summary of the *Coastline Management Manual 1990*. The Manual can be viewed in full at: <http://www.environment.gov.au/coasts/publications/nswmanual/index.html> (20 December 2007).

Protective Works

Seawalls
Training Walls
Groynes
Beach Nourishment
Offshore Breakwaters
Artificial Headlands
Configuration Dredging

The Manual does not advocate for any one option over another. The choice of the appropriate response in each particular circumstance falls within a council's discretion.

In light of the above, to act in accordance with the principles in the *Coastline Management Manual 1990*, councils must ensure that the potential effects of climate change are considered when conducting their activities, which arguably they have an obligation to do anyway. They will also have to select the most appropriate management options in particular circumstances. Perhaps the best way that councils can ensure they are protected by section 733 is to make a Coastal Zone Management Plan, which is made with guidance from the *Coastline Management Manual*.

An important thing to note is that demonstrating 'good faith' is not confined only to those actions where the *Coastline Management Manual* is relevant. Where the Manual is not relevant, or where it has not been followed, this does not mean that a council is not protected by Section 733. Instead, in such a case the council will have the burden of demonstrating that it has acted in good faith in some other way. For example, this will be the case for actions relating to estuaries as these are covered by the *Estuary Manual*, not by the *Coastline Management Manual*. Although the *Estuary Manual* is not listed in section 733, a council could establish good faith in conducting activities relevant to estuaries by demonstrating compliance with the *Estuary Manual*, as it represents accepted government policy.

The following case study is an example of the application of section 733 in relation to flooding.

Case Study: Bankstown City Council v Alambdo Holdings (2005) HCA 46

Alambdo Holdings sued Bankstown Council in nuisance and negligence for its failure to prevent inundation of its land by water overflowing from an unlined channel through which storm water flows. The council owned and maintained the stormwater drains. Notice of potential flooding problems was given to Alambdo before they purchased the property. The case went all the way to the High Court of Australia.

Alambdo had sought an injunction restraining council from allowing water to inundate their land and requiring \$1.5 million abatement works. Bankstown Council argued that it was protected from such a claim by section 733 of the *Local Government Act 1993*.

Alambdo counter-argued that the protection only applied to actions for damages, not injunctions. The High Court disagreed with this. They held that subject to resolving the question of acting in good faith, the council was protected from liability by the immunity under s 733(1) regardless of whether the claim was for damages or for an injunction.

The Court then had to determine whether Bankstown Council had acted 'in good faith'.

They found that where the *Coastline Management Manual* assumption of ‘good faith’ does not apply then a council will have the evidentiary burden of showing that it has acted in good faith. The High Court held that given the range of activities that section 733 can apply to, what ‘good faith’ means may vary from case to case. In this particular case Bankstown Council had deferred expenditure of infrastructure in prioritising other projects, which meant the storm water channels were not well maintained. The court held that this was nonetheless consistent with ‘good faith’ as councils often have to make such choices.

Although this case dealt with liability for flooding risk under s733(1), it is likely that the court will treat actions relevant to coastal hazards under s733(2) in a similar manner in deciding whether good faith is met. This will generally be determined on a case by case basis.

Summary: the Local Government Act exempts councils from liability for their activities that relate to coastal hazards. This applies to the grant of development consent, the building standards, the making of Local Environmental Plans, etc. However, there is a requirement for ‘good faith’ which can be satisfied by applying the *NSW Coastline Management Manual 1990*. However, what is ‘good faith’ will depend on the particular circumstances of each case.

1.2. Obvious risks

The *Civil Liability Act 2003* exempts public authorities from liability for obvious risks. Simply put, obvious risks are those that, in relevant circumstances, would have been obvious to a reasonable person.¹⁸ The section states that obvious risks include risks that are a matter of common knowledge. Further, a risk of something occurring can be an obvious risk even though it has a low probability of occurring, and even if the risk is not prominent, conspicuous or physically observable.¹⁹

With the potential effects of climate change now widely known, there is a strong argument that a reasonable person who lives on the coast should be aware of the dangers posed, and therefore that damage from erosion and sea-level rise would be damage from an obvious risk. For example, the Collaroy/Narrabeen area has been the subject of increased erosion due to recent storm activity. The risk is certainly an ‘obvious’ one. The risk to coastal property in Narrabeen is a matter of common knowledge and impacts have already been observed. Therefore, it would be difficult for a landholder to bring a negligence action against a local council for approving a development application in 2007 in a coastal area subject to erosion, since a reasonable landholder would have been well aware of the risks when submitting the application. No liability would arise in such a circumstance. However, what is an obvious risk would be determined by a court on a case by case basis.

Summary: councils bear no liability for ‘obvious risks’. Climate change impacts in the coastal zone are likely to be deemed “obvious risks” but this will depend on the particular circumstances.

¹⁸ Section 5F, *Civil Liability Act 2003*.

¹⁹ Section 5F(2), *Civil Liability Act 2003*.

2. Negligence

Although the *Local Government Act 1979* is likely to significantly protect councils from liability for negligence, the common law should be examined as it will apply if a court determines that the exemption from liability does not apply. Negligence is a civil action which provides a remedy for damage to person or property. The essence of the tort is that there has been a failure to take reasonable care to prevent injury to others. In order to find a council liable for negligence, there are three essential elements that must be established:

- *duty of care;*
- *breach of that duty; and*
- *damage as a result of that breach.*

2.1. Duty of Care

To establish that a duty of care exists that requires one party to prevent the risk of harm to another, it must be shown that certain relevant factors are present. This involves using the ‘salient factors’ test set out by the High Court in the case of *Perre v Apand (1999)*²⁰. The High Court used the term ‘salient factors’ to describe the factors that are of most importance in determining whether a duty of care exists. The High Court did not set out an exhaustive list of these, but made it clear that the factors to be considered depend on the circumstances of the case. However, in a general sense, an examination of further cases suggests that a duty of care will likely arise if the following criteria are satisfied:

- *Statutory powers* - Where the imposition of a duty of care is not inconsistent with a council’s statutory powers.
- *Proximity* - Where the parties are in close a relationship of closeness or proximity.
- *Control* – Where one of the parties is in a position of control and has the power to control the situation that brought about harm.
- *Knowledge* – Where one of the parties knew, or ought to have known, of an existing risk of harm to the plaintiff, or a specific class of persons who included the plaintiff (rather than the general public).
- *Vulnerability* – Where the claimant is in a position of vulnerability in that he or she could not reasonably take action to safeguard herself or himself.
- *Reasonableness* – Where it must be shown that it is reasonable in the circumstances to impose a duty of care.²¹

The use of the ‘salient factors’ approach is demonstrated most aptly by the case of *Graham Barclay Oysters P/L v Ryan (2002)*²². This case is of particular relevance as one of the respondents was the local council; Great Lakes. The action related to oyster contamination in Wallis Lake which led to the Applicants contracting Hepatitis. In relation to the action against the Council, the Applicants asserted that the Council was negligent as it did not use its powers under the *Local Government Act 1993* to monitor the water in the lake or to warn oyster farmers of contamination. The High Court disagreed,

²⁰ 198 CLR 180.

²¹ Zada Lipman & Robert Stokes, “Shifting Sands- the Implications of Climate Change and a Changing Coastline for Private Interests and Public Authorities in Relation to Waterfront Land” (2003) 20 *EPLJ* 406 at 414.

²² 125 LGERA 1.

finding that no duty of care existed between the local council and the oyster farmers. Justices Gummow and Hayne used the ‘salient factors’ test to come to this conclusion. They found that the council did not have control over the risk of harm and that the absence of this ‘salient factor’ meant that no duty of care existed.

Summary: Whether a duty of care exists is determined by examining the relationship between the relevant parties. Factors of relevance include the degree of control, the vulnerability of one of the parties, the knowledge of the risk of harm and the closeness of the parties.

2.2. Duty of care and climate change

Having established the legal test for determining whether a duty of care exists, it is now necessary to examine whether local councils are likely to owe a duty of care to landowners in circumstances where they suffer damage due to climate change impacts. The EDO has identified two potential bases for liability.

First, liability for the *positive actions* of councils, such as approving developments in areas likely to be subject to increased erosion, making Local Environment Plans, setting inappropriate building standards, or building sea walls that prove insufficient.

Second, liability for a *failure to act* such as taking no measures to address erosion impacts, such as not building sea walls, etc.

The likelihood of a duty of care being proved in these two circumstances will now be examined.

2.3. Positive actions

2.3.1. Development Assessment

In relation to development assessment, the consensus amongst practitioners and academics seems to be that councils *will* owe a duty of care to landowners in their consideration of individual development applications in coastal areas that are most at risk of climate change.²³ This would satisfy the ‘salient factors test’ as follows:

Control - although local councils have no control over climate change, they do have the ability to control and refuse consent to developments.²⁴

Vulnerability - homeowners are rendered vulnerable by planning decisions of councils over which they have no control.

²³ *Ibid* at p420, ²³ Jan McDonald, “The Adaptation Imperative: Managing the Legal Risks of Climate Change Impacts” *In*. T. Bonhady & P. Christoff (eds), *Climate Law in Australia*, MUP (forthcoming) at p20, Chris McGrath, “Legal Liability for Climate Change in Queensland”, Article submitted for publication in the *Queensland Environmental Practice Reporter* (2007) at p16, Jan McDonald and Phillipa England, “A Risky Climate for Decision-Making: The Legal Liability of Development Authorities for Climate Change Impacts”, paper delivered to the 2007 QELA Conference, Kingscliff, May 2007.

²⁴ Zada Lipman & Robert Stokes, “Shifting Sands- the Implications of Climate Change and a Changing Coastline for Private Interests and Public Authorities in Relation to Waterfront Land” (2003) 20 *EPLJ* 406 at 420.

Knowledge - councils are well aware, or should be aware, of the risks to coastal communities from climate change. Numerous scientific studies have established this.

Statutory powers - A duty of care in this situation would not be inconsistent with a council's powers under the *Environmental Planning and Assessment Act 1979*. Under that Act, councils have power to refuse development consent or allow it with conditions. Also, in determining an application a council is specifically required to consider the "suitability of the site for the proposed development". Furthermore, councils have obligations to consider coastal hazards under the *Coastline Management Manual 1990*, the *NSW Coastal Policy 1997* and the *Coastal Protection Act 1979*.²⁵

These factors taken together signal the likelihood that a duty of care will exist whenever councils consider proposed developments in the coastal zone. What that duty entails will be discussed in *Breach of Duty* section below.

Summary: Coastal Councils are likely to owe a duty of care to residents when considering development applications in the Coastal Zone.

2.3.2. Environmental Planning Instruments

Environmental planning instruments set out the strategic framework for development in local areas. In formulating their LEPs, councils take into account economic, social, and environmental factors. In weighing up their areas needs and priorities, political choices are often made in an attempt to balance competing interests. The courts traditionally do not inquire into government processes that involve political decision-making and prioritisation. As McDonald and England express it:

*It will probably be hard for individual property owners to establish a duty exists in relation to the development of planning schemes, since this level of quasi-legislative decision is generally characterised as political in nature, and therefore not subject to judicial scrutiny.*²⁶

Hence it will be difficult for landowners to argue that a council had a duty of care to consider the likely impacts of climate change on coastal property owners when deciding on the appropriate zoning or planning controls for land in their local area. The zoning of land is undoubtedly a politically charged issue as councils have up to weigh up the social effects, environmental consequences and economic benefits of adopting a particular zoning. Furthermore, the Standard LEP requires councils to include mandatory provisions and places restrictions on the zoning that councils can implement. Thus, once a standard LEP is adopted, it will be hard to bring an action against councils in relation to their LEPs as they may no longer have complete control over zoning, particularly in relation to the mandatory provisions.

However, as mentioned in Part A, Local Environment Plans must be consistent with, and give effect to, the *NSW Coastal Policy 1997*, the *Coastline Management Manual 1990* and various regional strategies. These all require the consideration of appropriate planning mechanisms that address sea level changes as a result of climate change. If these policies

²⁵ *Ibid.*

²⁶ Jan McDonald and Phillippa England, "A Risky Climate for Decision-Making: The Legal Liability of Development Authorities for Climate Change Impacts", paper delivered to the 2007 QELA Conference, Kingscliff, May 2007 at p8.

are substantively implemented by councils in making their LEPs then this would likely satisfy the obligations under a duty of care even if it existed. Furthermore, as the process of development assessment is closely tied to the production and implementation of LEPs, councils should consider any duty of care they will likely have during development assessment when developing their LEPs. Such a strategic approach to the issue of coastal hazards and climate change may prevent any problems or potential liability at the development assessment stage.

Summary: Councils are not likely to owe a duty of care in relation to the preparation of environmental planning instruments. In any case, councils will be protected as long as they consider appropriate planning and management mechanisms that address sea level changes as a result of climate change when making their LEPs.

2.4. Failure to Act

A significantly different question to whether statutory activities may render councils liable is whether a duty of care exists that requires councils to undertake positive actions to ameliorate the likely impacts of climate change where they are not obliged to do so by legislation.

Essentially the landowner in this scenario would be alleging the existence of a duty of care within a discretionary legislative framework that empowers councils to take certain actions. The problem is that whether or not a council exercises its statutory duties in a particular way is usually not able to be questioned by a court, as this relates to councils' core policy-making functions. Policy decisions balancing competing interests in the allocation of limited resources are not generally reviewable, even if the powers in question relate to public health and safety.²⁷ For example, a decision by a council to invest in remediation works for contaminated land, which is having a severe health impact on the neighbouring people, rather than invest in adaptive measures to address the potential future impacts of climate change, is essentially a policy decision made by councils. The High Court has emphasised that councils are entitled to decide how their powers should be allocated and to prioritise their allocation of resources.²⁸ As Gleeson CJ said in *Ryan*, decisions about "setting priorities between competing claims on scarce resources are essentially political".²⁹ Further, the mere fact that a statutory power to do something exists does not mean that a public authority owes a duty of care in relation to that power. The rationale is that councils should not be held to have acted negligently merely because a risk of harm could have been reduced or eliminated by the expenditure of more resources.³⁰

The *Civil Liability Act 2003* has recognised the need to protect policy decisions from liability. It stipulates:

The following principles apply in determining whether a public or other authority has a duty of care or has breached a duty of care in proceedings for civil liability to which this Part applies:

²⁷ David Baker *et al*, *Torts Law in Principle* (2002), Lawbook Co at p13-6.

²⁸ Zada Lipman & Robert Stokes, "Shifting Sands- the Implications of Climate Change and a Changing Coastline for Private Interests and Public Authorities in Relation to Waterfront Land" (2003) 20 *EPLJ* 406 at 420.

²⁹ *Graham Barclay Oysters P/L v Ryan* (2002) 125 *LGRA* 1.

³⁰ Francis Tindade *et al*, *The Law of Torts in Australia* (2007, 4th edition), Oxford University Press at p620.

- (a) the functions required to be exercised by the authority are limited by the financial and other resources that are reasonably available to the authority for the purpose of exercising those functions,*
- (b) the general allocation of those resources by the authority is not open to challenge,*
- (c) the functions required to be exercised by the authority are to be determined by reference to the broad range of its activities (and not merely by reference to the matter to which the proceedings relate),*
- (d) the authority may rely on evidence of its compliance with the general procedures and applicable standards for the exercise of its functions as evidence of the proper exercise of its functions in the matter to which the proceedings relate.³¹*

This provision appears to be a statutory endorsement of the common law position. A court must take into account the resources of local councils when determining whether a breach of duty has occurred. Also it is made clear that any action that broadly relates to the allocation of council resources - that is, whether a public authority should have taken a particular action over another, is not open to challenge. In summary, it is unlikely that a council will have a positive duty of care in relation to its statutory discretion, as this concerns policy-making and resource allocation decisions.

On the other hand, the situation may be different where a council has conducted preventative activities in the past but has made a policy decision to discontinue these practices, or to take no further actions. In the *Graham Barclay* case, McHugh J recognised this as a possible exception to the general rule:

...if the authority has used its powers to intervene in a field of activity and increased the risk of harm to persons, it will ordinarily come under a duty of care...but subject to these exceptions, ordinarily the common law will not impose an affirmative duty of care on an authority which would have the result that a failure to exercise a statutory power constitutes a breach of that duty.

This passage is important as it establishes that the standard common law position is that a failure to exercise statutory powers is not challengeable. However, where an authority *has* used its powers, this may give rise to a duty of care, particularly if the actions of the council have somehow increased the risk of harm. This takes it out of the “policy” sphere and into the “operational” one. An example is where a council has previously undertaken emergency dumping of fill and rock on the shoreline and has constructed sea walls to reduce the impact of erosion, but has now abandoned such works. Several years later the sea level rises, the sea-wall collapses and several houses are destroyed.³² In such a scenario it is likely that a duty of care will arise as adaptive activities by councils have contributed to the damage caused. The consequence of this is that councils should ensure that actions they take to address sea level rise, such as seawall construction, are scientifically and structurally sound. Moreover, councils should ensure that they regularly maintain and monitor such structures.

Summary: a duty of care is unlikely to exist for a council’s failure to act to address climate change risks in the coastal zone. This is because whether a council conducts statutory activities is discretionary, and is dependent on the availability of resources and councils’ priorities.

³¹ Section 42, *Civil Liability Act 2003*.

³² Zada Lipman & Robert Stokes, “Shifting Sands- the Implications of Climate Change and a Changing Coastline for Private Interests and Public Authorities in Relation to Waterfront Land” (2003) 20 *EPLJ* 406 at 421.

2.5. Breach of Duty

Once a duty of care does is established, the next question for determination is whether there has been a breach of that duty. In answering this question the common law has traditionally asked itself two questions. First, would a reasonable person in the council's position have foreseen that their conduct involved a risk of injury to the plaintiff or to a class of persons including the plaintiff?³³ Secondly, if the answer to that question is yes, what would a reasonable person do to address or eliminate the risk?³⁴ The High Court's has found that in attempting to answer these questions, there must be an evaluation of the magnitude of the risk, the degree of probability of the risk, and the expense and difficulty of taking action.³⁵

The probability of the risk of climate change impacts is uncertain for any particular council. The precise localised impacts of a global phenomenon such as climate change are hard, or indeed impossible, to quantify or predict. However, it is now beyond question that climate change poses a significant threat to coastal communities so as to warrant a concerted response by councils. Indeed, scientific studies point to potential impacts of significant magnitude for local communities.

An important point to make is that whether someone has breached their duty of care is determined by reference to the state of understanding at the time of the conduct which ultimately led to the damage.³⁶ Therefore, councils will not be liable for damage that is a result of poor planning decisions 30 years ago when climate change risks were unknown. This point is well demonstrated by the following case study.

Egger v Gosford Shire Council (1989) 67 LGRA

This case involved a negligence action by a Mrs Egger against Gosford Shire Council for granting development consent in 1968 to a three-storey residential flat building on land extending across a frontal dune onto Wamberal Beach. During a severe storm in 1974 the sea eroded the sand dune to such an extent that much of Mrs Egger's house collapsed onto the beach and into the sea. The remainder had to be demolished. Mrs Egger claimed that the council was negligent in approving the erection in 1968 of a building three blocks south, and in allowing the residents of that building to build emergency works in 1974 that led to increased storm and wave action on her property.

The NSW Court of Appeal held that even if the council owed the plaintiff a duty of care (which they did not decide), no breach of that duty occurred as it was not established that the damage to her property was reasonably foreseeable.

Even though the Court found that Gosford Shire Council should have consulted professional engineers in 1968 before approving the works, it could not be shown that the engineers' advice would probably have warned the council about the particular risks faced. Since the science was still in the early stage of development in 1968, there was no probability of obtaining proper professional advice amongst practising engineers. The Court therefore concluded that even if Gosford Council had sought expert advice it

³³ *Ibid* at p415.

³⁴ *Wyong Shire Council v Shirt* (1980) 146 CLR 40.

³⁵ *Graham Barclay Oysters P/L v Ryan* (2002) 125 LGERA 1.

³⁶ R Buckley (ed), *Climate Response – Issues costs and liabilities in adapting to climate change in Australia* (2007) Griffith University at p15.

would not have been advised that the works council approved would have created risks to Mrs Egger's property.

This case is important as it shows that actions against councils for coastal hazards will be decided on the basis of the available science and expertise *at the time* of the relevant event. Therefore, if a negligence action is taken against a council for its failure to address climate change in approving a development prior to 1990, it could be argued that the knowledge of climate change at the time was scant or non-existent and therefore future climate change impacts were not reasonably foreseeable. For development approvals after 1990, this would be difficult to argue as climate change was well known to scientists after this time.

2.5.1. Development Assessment

A reasonable council located on the coast in an area prone to erosion and storm damage, would foresee that its decisions to approve development may place landholders at risk from the effects of climate change. Scientific evidence and impacts already observed make this clearly foreseeable. In order to meet their duty of care, councils can either refuse consent, or allow the development to proceed with conditions that attempt to reduce the risk.³⁷ The *NSW Coastline Management Manual 1990* and the *NSW Coastal Policy 1997* should be consulted by councils when assessing development. It is probably also advisable to create a management plan specific to the locality. As long as a council makes a genuine and serious attempt to alleviate the potential risks of climate change, then it is likely that a council's duty of care will be satisfied. For example, the Warringah LEP sets out extensive requirements for assessing developments in precarious coastal areas. The Council has developed the *Collaroy/Narrabeen Coastline Management Plan 1997* which must be taken into account, along with the State Government's *Coastline Management Manual 1990*, which sets out a variety of management options. Any development approval granted must include a mandatory condition to minimise sand removal during construction. The council also has criteria for appropriate setbacks and foundation criteria for structures in risk areas. Furthermore, several areas are marked as inappropriate for development. This is likely to be sufficient to discharge the council's duty of care. The council is using their planning powers appropriately to minimise risks through a combination of prohibited areas, local policies, precautionary building standards, mandatory conditions and warnings. This should serve as a good example to other coastal councils of how their duty of care in relation to development assessment could be met. Lack of a co-ordinated or precautionary approach to development may leave councils liable to an action in negligence.

It is important to note that under the *Civil Liability Act 2003* the resources of councils will be taken into account when determining whether a duty of care has been breached.³⁸ Therefore, financially strapped councils will likely be subject to a lesser expected response in meeting their duty of care.

³⁷ Zada Lipman & Robert Stokes, "Shifting Sands- the Implications of Climate Change and a Changing Coastline for Private Interests and Public Authorities in Relation to Waterfront Land" (2003) 20 *EPLJ* 406 at 421.

³⁸ Section 42, *Civil Liability Act 2003*.

Summary: To discharge its duty of care in assessing development applications in the coastal zone, a council should adopt clear climate change management plans, appropriate building standards, set back policies, mandatory precautionary conditions and prohibited development zones. The *NSW Coastal Policy* and *Coastline Management Manual* should also be followed. However, the scope of the response expected depends on the resources of the council.

2.5.2. Civil Liability Act - new test for breach

The test for a breach of duty has now been significantly amended by the *Civil Liability Act 2002*. It has lifted the threshold, and lessened the likelihood of liability significantly. A breach of duty will now only be proven if it can be shown that a council acted “in the circumstances so unreasonably that no authority having the functions of the authority in question could properly consider the act or omission to be a reasonable exercise of functions”.³⁹

McDonald has noted “this standard sets the bar for reasonable conduct very low indeed” and will be difficult to establish.⁴⁰ However, in light of increasing public awareness and concern over climate change, and recognition by the judiciary of the likely impacts of climate change in cases such as *Gray*⁴¹, the courts may now be open to the argument that a council’s omission to act to address climate change is “so unreasonable” given the public concern, the impacts already being felt and the scientific projections of sea level rise scenarios. To protect themselves council’s should adopt clear policies to address and consider climate change. The standard LEP ensures that councils in the coastal zone must consider the potential impacts of climate change when assessing a development, in addition to the *Coastal Policy* and *Coastline Management Manual*. Complying with these will go some way to protecting councils from suggestions they have acted unreasonably in the discharge of their functions.

Summary: The *Civil Liability Act 2003* has introduced a new test to determine whether a council has breached its duty of care. A council will breach its duty only if it has acted ‘so unreasonably’. This would be difficult to establish but councils should still protect themselves by adopting clear policies.

2.6. Causation

Showing that a council did not meet the reasonable standard of care expected of it is not enough to show that a council is negligent. It must also be shown that any damage suffered by the plaintiff was caused by the council’s failure to meet its duty of care. The legal test of causation traditionally has two elements:

- 1) whether the defendant’s conduct caused the damage, and

³⁹ Section 43(2), *Civil Liability Act 2003*.

⁴⁰ Jan McDonald, “The Adaptation Imperative: Managing the Legal Risks of Climate Change Impacts” In T. Bonhady & P. Christoff (eds), *Climate Law in Australia*, MUP (forthcoming) at p20,

⁴¹ In the case of *Gray v Minister for Planning*, Justice Pain required the Director-General of the Department of Planning to consider the climate change impacts, both direct and indirect, of a proposed coal mine. This was despite there being any clear obligation to do so under Part 3A of the *Environmental Planning and Assessment Act 1979*.

2) whether the damage suffered was reasonably foreseeable and not “too remote”.⁴²

The courts have established that for an act to be causative it must ‘substantially, significantly, or materially contribute to the impact or result’.⁴³ However, there may be more than one cause of the damage suffered. But the fact that another cause is identified does not mean that a council escapes liability. Previous cases have shown that it is not necessary that a cause of damage suffered be the sole, direct or immediate cause.⁴⁴

In terms of negligence actions taken as a result of damage or injury suffered in the coastal zone, the main contributing factor to the damage is of course climate change resulting from worldwide carbon dioxide emissions. However, all that is required to establish that a council’s breach of duty caused the damage suffered is to show that a council’s development approval for example ‘materially contributed to the damage suffered’. The second element, which involves showing that any damage suffered was reasonably foreseeable, may not be problematic. It is arguable that damage suffered by coastal properties is a foreseeable consequence of a council’s failure to take precautionary measures or in not refusing consent to particularly risky coastal developments.

2.6.1. Development Assessment

It may not be difficult to establish causation in a case which relates to a council’s approval of a development application in the coastal zone. The argument would be that had the council in question refused development consent, or imposed appropriate conditions, the development would not have gone ahead, and the damage would not have been suffered. Lipman and Stokes believe this is sufficient to establish causation.⁴⁵ Although a council does not directly cause the damage in such a situation, it is arguable that the council has materially contributed to the damage suffered by allowing a development to be situated in a position of risk.

However, causation is generally a difficult question to resolve. It must be emphasised that whether a council’s breach of duty has led to the damage complained of will be decided on the particular circumstances of the case.

2.6.2. Omissions

Where it has been shown that a council has breached its duty of care in failing to take appropriate action to address the risks of climate change, the subsequent question of whether the element of causation can be satisfied is quite problematic. The High Court has held that if precautions would not have prevented the harm complained of, then there is no causal relation between the breach and the harm.⁴⁶ That is, if the damage would have been suffered anyway, the defendant is not liable. This somewhat protects councils from liability, because it would be difficult for a landowner to show that the damage would have been prevented had council taken certain action. Considering the unpredictable impacts of climate change, this would be difficult indeed. Indeed,

⁴² David Baker *et al*, *Torts Law in Principle* (2002), Lawbook Co at p13-3.

⁴³ Chris McGrath, “Legal Liability for Climate Change in Queensland”, Article submitted for publication in the *Queensland Environmental Practice Reporter* (2007) at p12

⁴⁴*Ibid*.

⁴⁵ Zada Lipman & Robert Stokes, “Shifting Sands- the Implications of Climate Change and a Changing Coastline for Private Interests and Public Authorities in Relation to Waterfront Land” (2003) 20 *EPLJ* 406 at 421.

⁴⁶ *Rosenberg v Percival* (2001) 205 CLR 434; *Dorwo Pty Ltd v Wilkins* (2003) 77 ALJR 1706.

commentators note that even where adaptive measures are taken to address coastal hazards, the consequences of climate change are likely to be significant.⁴⁷ That is, even if preventative measures are taken, it may be that the damage suffered would have been unavoidable. The *Civil Liability Act 2002* states that public authorities will bear no liability for 'inherent risks'. These are risks of something occurring that cannot be avoided by the exercise of reasonable care or skill.⁴⁸ However, the section does not exclude liability in connection with a duty to warn of a risk.⁴⁹

Again, it must be emphasised that causation will depend on the circumstances of the individual case.

Summary: to establish negligence it needs to be shown that council action or inaction caused the damage complained of. However, causation is determined on the individual facts of each case.

3. Nuisance

A potential alternative claim against councils would be a nuisance action.⁵⁰ Nuisance relates to an interference with a neighbour's property or enjoyment of their property, where such interference is indirect.⁵¹ A nuisance action is different from negligence as you do not have to prove breach of any duty. All that is required is to show that 'material interference' has occurred with someone's land which is unreasonable and substantial.

A nuisance action may arise against a council in two situations relevant to climate change:

- The construction of preventative works that creates problems for neighbours; and
- Council's inaction in preventing 'nuisances' caused by climate change.

The first situation relates to where a council has undertaken protective works. A nuisance may arise if rock walls or levee banks are poorly located, designed or constructed.⁵² This may create problems for neighbouring properties. If 'material interference' is shown, councils may be liable. If council's have control over the land where the problems arise from, then there is certainly a possibility of nuisance being proven.

The second situation seeks to make councils liable for failing to take action to prevent climate change impacts from interfering with neighbouring properties. However, there are a few impediments preventing a nuisance action from being brought against a council in such a situation. Firstly, councils need to have control over the nuisance. This is difficult for natural processes. As McDonald and England note, councils are only obliged

⁴⁷ Zada Lipman & Robert Stokes, "Shifting Sands- the Implications of Climate Change and a Changing Coastline for Private Interests and Public Authorities in Relation to Waterfront Land" (2003) 20 *EPLJ* 406 at 421.

⁴⁸ Section 5A, *Civil Liability Act 2003*.

⁴⁹ Section 5A(3), *Civil Liability Act 2003*

⁵⁰ Phillippa England, "Climate Change: what are local governments liable for?", pp5-7. Found at: http://www.griffith.edu.au/centre/urp/urp_publications/Issues_Papers/URP_IP6_ENGLAND_Climate_LocGovt_final.pdf (28 August 2007).

⁵¹ *Hollywood Silver Fox Farm v Emmett* (1936) 2 KB 468.

⁵² *Ibid.*

to take positive action to prevent the effect of climate change on neighbouring land if the nuisance actually emanates from council land or land controlled by council.⁵³

Secondly, it would be hard to show that the interference would not have happened even if a council had taken reasonable preventative steps. With the unpredictable effects of climate change, to demonstrate this would be difficult. Finally, any nuisance actions against public authorities are subject to the same *Civil Liability Act* and *Local Government Act* provisions that affect negligence. This makes such claims unlikely to succeed, but councils need to be aware of the potential for such claims.

Summary: Nuisance actions can be brought against councils where the construction of works creates problems for neighbours, or where councils have failed to prevent the effects of climate change. However, this would be difficult as it must be shown that councils have control over the nuisance and that steps could have been taken to prevent it.

⁵³ *Goldman v Hargrave* (1963) 37 ALJR 277.

Part D. Overarching conclusions

This report has demonstrated that currently there is little mention of climate change in Australian legislation. Only 16 legal instruments at a federal, state and local level were identified. It has also been demonstrated that of those instruments that do mention climate change, none impose mandatory duties on local councils. The statutory requirements that exist are largely discretionary, or are found in objects clauses. These provisions require the *consideration* of climate change impacts and potential preventative and adaptive behaviour. They say nothing about the final outcome of decisions. Councils are merely required to take climate change into account, but are not required to make ‘climate friendly’ decisions. However, it is likely that legislation will be amended in the near future to require positive actions by councils and/or the mandatory refusal of development applications once climate change impacts become more widespread and common. Hence, a precautionary approach is advisable, which is consistent with Ecologically Sustainable Development. Indeed, the *NSW Coastal Policy 1997* makes it clear that:

*The precautionary principle should be used at the project level, for example in assessing development applications in areas prone to shoreline recession, and at the strategic level, for example in the development of coastline management plans and local environmental plans. The precautionary principle is particularly relevant to the issue of climate change and sea level rise in coastal areas.*⁵⁴

In light of the above, there arises a persuasive argument that the statutory framework should be improved. The discretionary nature of councils’ activities has left many local councils unsure of how to tackle climate change. Legislation should clearly set out the responsibilities of councils. Furthermore, an air of uncertainty may leave councils open to potential negligence claims.

In relation to common law actions, councils are currently protected to a significant extent from civil liability as a result of their activities. As identified above, a successful action would have to overcome various significant obstacles. However, the law of negligence is currently in a state of flux in Australia. The law is a dynamic creature that constantly evolves to suit new social and environmental values. Hence, despite the low likelihood of liability, councils need to be wary of legal and statutory developments that may lead to strict obligations being placed on councils to address climate change. Considering that climate change impacts are already being felt, this may come sooner rather than later. Councils therefore cannot be complacent. As Lipman and Stokes state, the “spectre of liability remains, despite legislative attempts at limitation”.⁵⁵

However, although there is an air of uncertainty, there *are* measures that councils can take to prevent their potential liability and to minimise the impacts of climate change on their communities. For example, compliance with the *NSW Coastline Management Manual 1990* is crucial as this ensures that councils have the benefit of the *Local Government Act* exemptions from liability. The Manual requires councils to adopt appropriate management actions in order to combat potential climate change risks in the coastal zone. The Manual sets out four types of adaptation activities councils can take.

⁵⁴ *NSW Coastal Policy 1997* at p16.

⁵⁵ Zada Lipman & Robert Stokes, “Shifting Sands- the Implications of Climate Change and a Changing Coastline for Private Interests and Public Authorities in Relation to Waterfront Land” (2003) 20 *EPLJ* 406 at 422.

First, councils should implement the appropriate use of planning mechanisms. These include adopting buffer zones in LEPs, restrictive zoning and planned retreat. Councils may also make use of their land acquisition powers to compulsorily acquire properties that are subject to significant risk of climate change impacts. *Second*, councils should set development control conditions, such as setbacks. *Third*, councils may conduct dune management activities such as reconstruction, maintenance and revegetation. *Lastly*, protective works may be appropriate, such as beach nourishment and the construction of seawalls.

Other advice to councils would be to adopt clear climate change policies, prepare Coastal Zone Management Plans, apply the NSW Coastal Policy and provide ongoing advice to residents of the dangers posed to their properties by sea level rise. State government assistance programs, such as the Coastal Management Program, should also be used by councils, as these provide funding to conduct adaptive activities, such as creating Coastal Zone Management Plans. It is also vitally important that councils keep themselves informed about the latest science. The IPCC regularly releases updates of the latest sea level rise and temperature scenarios. These scientific developments allow councils to amend their climate change response as sea level projections become more certain. The five year compulsory review of LEPs provides a set timeframe for review which will allow councils to amend their LEPs as the risks of climate change and more scientifically sound information comes to light.

Councils should adopt a mix of adaptation measures as appropriate to their local areas, and to their degree of risk. Indeed, as identified by the Local Government Association of Queensland, adaptation measures vary widely in cost, time and effort in implementation. The Association has suggested a hierarchy of measures appropriate in the coastal zone reflecting the degree of risk, time, cost and effort.⁵⁶ At the bottom of the hierarchy is information to the community. In the middle are measures to change regulations and update design guidelines. At the top, the pyramid suggests the relocation of activities. Thus, as the risks of climate change become more pronounced with each new IPCC report, councils should begin moving towards the top of the hierarchy in addressing the impacts of climate change.

In conclusion, although there is considerable concern amongst local councils about their responsibilities and liability for climate change, the current coastal zone management framework in NSW provides considerable scope for councils to conduct adaptation activities to protect their communities from coastal impacts, and to minimise their legal liability. However, the statutory framework could be improved to better elucidate the responsibilities of councils and to provide guidance on how risks should be addressed.

Recommendations for reform

This report has identified a clear need for state government guidelines to assist councils in setting benchmarks for strategic planning in relation to coastal hazards, and in providing guidance on when and how to conduct adaptive activities that address climate change risks in the coastal zone. In addition to removing much of the uncertainty for councils, these guidelines will ensure that a consistent approach to sea level rise is taken throughout NSW. This is the next step in achieving a robust coastal zone management framework for NSW. Government guidelines should build on the *NSW Coastal Policy*,

⁵⁶ Local Government Association of Queensland, *Adapting to climate change – A Queensland Local Government guide*- June 2017.

Coastline Management Manual, Coastal Protection Act 1979 and the recently adopted regional strategies to ensure that a consolidated and targeted approach to climate change risks in the coastal zone is taken.

Appendix

1. List of instruments examined

Below is a list of all instruments examined during the project. Ones marked in **red** contain references to ‘climate change’, ‘greenhouse’ or ‘sea level rise’.

1.1. Commonwealth Legislation

- *Aboriginal and Torres Strait Islander Heritage Protection Act 1984*
- *Australian Heritage Council Act 2003*
- *Environment Protection (Sea Dumping) Act 1981*
- *Environment Protection and Biodiversity Conservation Act 1999*
- *Great Barrier Reef Marine Park Act 1975*
- *Hazardous Waste (Regulation of Exports and Imports) Act 1989*
- *Murray-Darling Basin Act 1993*
- *National Greenhouse and Energy Reporting Act 2007*
- *Renewable Energy (Electricity) Act 2000*
- *Petroleum (Submerged Lands) Act 1967*
- *Offshore Minerals Act- 1994*
- *Offshore Petroleum Act 2006*
- *Water Efficiency Labeling and Standards Act 2005*

1.2. NSW Acts

- *Environmental Planning and Assessment Act 1979*
- *Coastal Protection Act 1979*
- *Catchment Management Authorities Act 2003*
- *Community Land Management Act 1989*
- *Contaminated Land Management Act 1997*
- *Crown Lands Act 1989*
- *Electricity Supply Act 1995*
- *Energy and Utilities Administration Act 1987*
- *Environmentally Hazardous Chemicals Act 1985*
- *Fisheries Management Act 1994*
- *Fisheries Act 1935*
- *Forestry Act 1916*
- *Forestry and National Parks Estate Act 1998*
- *Freedom of Information Act 1989*
- *Heritage Act 1977*
- *Local Government Act 1993*
- *Marine Parks Act 1997*
- *Mine Subsidence Compensation Act 1961*
- *Mining Act 1992*
- *Murray-Darling Basin Act 1992*
- *National Parks and Wildlife Act 1974*

- *Native Vegetation Act 2003*
- *Natural Resources Commission Act 2003*
- *Noxious Weeds Act 1993*
- *Pesticides Act 1999*
- *Protection of the Environment Operations Act 1997*
- *Protection of the Environment Administration Act 1991*
- *Public Works Act 1912*
- *Rivers and Foreshores Improvement Act 1948*
- *Roads Act 1993*
- *Rural Fires Act 1997*
- *State Emergency Services Act 1989*
- *State Emergency and Rescue Management Act 1989*
- *Threatened Species Conservation Act 1995*
- *Water Management Act 2000*

1.3. NSW Regulations

- *Environmental Planning and Assessment Regulation 2000*
- *Coastal Protection Regulation 2004*
- *Forestry Regulation 2004*
- *Local Government (General) Regulation 2005*
- *Fisheries Management (General) Regulation 2002*
- *Crown Lands Regulation 2006*
- *Mining Regulation 2003*
- *National Parks and Wildlife Regulation 2002*
- *Rural Fires Regulation 2002*
- *Threatened Species Conservation Regulation 2002*
- *Water Management (General) Regulation 2004*

1.4. NSW State Environmental Planning Policies (SEPPs)

- *SEPP 1- Development Standards*
- *SEPP 4-Development without consent and miscellaneous exempt and complying development*
- *SEPP 8- Surplus Public Land*
- *SEPP 14- Coastal Wetlands*
- *SEPP 19- Bushland in Urban Areas*
- *SEPP 26- Littoral Rainforests*
- *SEPP 29- Western Sydney Recreation Area*
- *SEPP 30- Intensive Agriculture*
- *SEPP 32- Urban Consolidation*
- *SEPP 44- Koala Habitat Protection*
- *SEPP 48- Major Putrescible Landfill sites*
- *SEPP 55- Remediation of Land*
- *SEPP 62- Sustainable Aquaculture*
- *SEPP 71- Coastal Protection*
- *State Environmental Planning Policy (Major Projects) 2005*

- *State Environmental Planning Policy (Sydney Region Growth Centres) 2006*

1.5. NSW Regional Environmental Plans (REPs)

- *Sydney Regional Environmental Plan No 6—Gosford Coastal Areas*
- *Sydney Regional Environmental Plan No 8 (Central Coast Plateau Areas)*
- *Sydney Regional Environmental Plan No 14—Eastern Beaches*
- *Sydney Regional Environmental Plan No 16—Walsb Bay*
- *Sydney Regional Environmental Plan No 17—Kurnell Peninsula (1989)*
- *Sydney Regional Environmental Plan No 21—Warringah Urban Release Areas*
- *Sydney Regional Environmental Plan No 29—Rhodes Peninsula*
- *Sydney Regional Environmental Plan No 31—Regional Parklands*
- *Sydney Regional Environmental Plan No 33—Cooks Cove*
- *Sydney Regional Environmental Plan (Sydney Harbour Catchment) 2005*
- *Greater Metropolitan Regional Environmental Plan No 1—Redevelopment of Urban Land*
- *Greater Metropolitan Regional Environmental Plan No 2—Georges River Catchment*
- *Hunter Regional Environmental Plan 1989*
- *Illawarra Regional Environmental Plan No 1*
- *Illawarra Regional Environmental Plan No 2- Jamberoo Valley*
- *Jervis Bay Regional Environmental Plan 1996*
- *Lower South Coast Regional Environmental Plan No 1*
- *Lower South Coast Regional Environmental Plan No 2*

1.6. Local Environmental Plans

- *Standard Instrument (Local Environmental Plan) Order 2006*
- *Ballina Local Environmental Plan 1987*
- *Bega Valley Local Environmental Plan 2002*
- *Bellingen Local Environmental Plan 2003*
- *Botany Bay Local Environmental Plan 1995*
- *Byron Local Environmental Plan 1988*
- *Coffs Harbour Local Environmental Plan 2000*
- *Eurobodalla Rural Local Environmental Plan 1987*
- *Eurobodalla Urban Local Environmental Plan 1999*
- *Gosford Local Environmental Plan No 22*
- *Great Lakes Local Environmental Plan 1996*
- *Greater Taree Local Environmental Plan 1995*
- *Hastings Local Environmental Plan 2001*
- *Hornsby Shire Local Environmental Plan 1994*
- *Hurstville Local Environmental Plan 1994*
- *Kiama Local Environmental Plan 1996*
- *Kogarah Local Environmental Plan 1998*
- *Lake Macquarie Local Environmental Plan 2004*
- *Lane Cove Local Environmental Plan 1987*
- *Leichhardt Local Environmental Plan 2000*
- *Lismore Local Environmental Plan 2000*

- *Manly Local Environmental Plan 1988*
- *Mosman Local Environmental Plan 1998*
- *Nambucca Local Environmental Plan 1995*
- *Newcastle Local Environmental Plan 2003*
- *North Sydney Local Environmental Plan 1989*
- *North Sydney Local Environmental Plan 2001*
- *Pittwater Local Environmental Plan 1993*
- *Port Stephens Local Environmental Plan 2000*
- *Randwick Local Environmental Plan 1998*
- *Rockdale Local Environmental Plan 2000*
- *Richmond River Local Environmental Plan 1992*
- *Shellharbour Local Environmental Plan 2000*
- *Schoalhaven Local Environmental Plan 1985*
- *Sutherland Shire Local Environmental Plan 2006*
- *Sydney Local Environmental Plan 2005*
- *Tweed Local Environmental Plan 2000*
- *Warringah Local Environmental Plan 2000*
- *Waverley Local Environmental Plan 1996*
- *Willoughby Local Environmental Plan 1995*
- *Wollongong Local Environmental Plan 1990*
- *Wollongong City Centre Local Environmental Plan 2007*
- *Woollahra Local Environmental Plan 1995*
- *Wyang Local Environmental Plan 1991*

1.7. NSW Policies

- *NSW Coastal Policy 1997*
- *NSW Coastal Hazards Policy*
- *NSW Coastline Management Manual 1990*
- *NSW Metropolitan Strategy 2006*
- *NSW Biodiversity Strategy*
- *NSW Greenhouse Plan*
- *National Greenhouse Strategy*
- *NSW State Plan*
- *Central Coast Regional Strategy*
- *Hunter Regional Strategy*
- *North Coast – Far North Regional Strategy*
- *North Coast – Mid North Regional Strategy*
- *Southern Region – Illawarra Regional Strategy*
- *Southern Region – South Coast Regional Strategy*
- *East Draft Subregional Strategy*
- *South Draft Subregional Strategy*
- *Inner North Draft Subregional Strategy*
- *North Draft Subregional Strategy*

- *North East Draft Subregional Strategy*
- *South West Subregional Strategy*

2. List of relevant provisions found in instruments

This section contains all relevant provisions identified. They are categorised into three categories: provisions in Environmental Planning Instruments, NSW Government Policies, and provisions in Acts and Regulations. Identified references are marked in **Red**.

2.1. Provisions located in Environmental Planning Instruments

2.1.1. Objects clause provisions

Four LEPs were identified that contained the terms “climate change”, “sea level rise” or “greenhouse” in objects clauses. These are reproduced below:

Standard Instrument – Principal Local Environment Plan

32 Development within the coastal zone

(1) The objectives of this clause are as follows:

- (a) to provide for the protection of the coastal environment of the State for the benefit of both present and future generations through promoting the principles of ecologically sustainable development,*
- (b) to implement the principles in the NSW Coastal Policy, and in particular to:*
 - (i) protect, enhance, maintain and restore the coastal environment, its associated ecosystems, ecological processes and biological diversity and its water quality, and*
 - (ii) protect and preserve the natural, cultural, recreational and economic attributes of the NSW coast, and*
 - (iii) provide opportunities for pedestrian public access to and along the coastal foreshore, and*
 - (iv) recognise and accommodate coastal processes and **climate change**, and*
 - (v) protect amenity and scenic quality, and*
 - (vi) protect and preserve beach environments and beach amenity, and*
 - (vii) protect and preserve native coastal vegetation, and*
 - (viii) protect and preserve the marine environment, and*
 - (ix) ensure that the type, bulk, scale and size of development is appropriate for the location and protects and improves the natural scenic quality of the surrounding area, and*
 - (x) ensure that decisions in relation to new development consider the broader and cumulative impacts on the catchment.*

Rockdale Local Environmental Plan 2000

Zone 2 (a1) Low Density (Restricted) Residential zone

Objectives of the Zone

- (a) to identify land which is not appropriate for medium and high density residential development due to the following:*
 - (i) the land may be subject to tidal inundation, flooding or drainage problems due to **climatic changes** associated with the **Greenhouse** Effect, and*
 - (ii) the land contains a heritage item or is within an area which has potential to be made a heritage conservation area, and*
 - (iii) the use of the land for medium density residential development may preclude the orderly planning of the land, and*
- (b) to promote a scale, form and character of residential development which is compatible with the established residential development, and*

- (c) to allow certain non-residential low density development which does not detrimentally affect the character and amenity of the area.

Mosman Local Environment Plan 1998

28 Foreshore building line

- (1) The objectives of this clause are:
- (a) to protect the natural landform and landscape of the foreshore, and
 - (b) to contribute to a bushland and wildlife corridor around the foreshore of Mosman, and
 - (c) to control pollution by limiting stormwater run-off directly into waterways by retaining and protecting vegetation along the foreshore, and
 - (d) to protect the visual amenity of the foreshore, and
 - (e) to protect dwellings from potential rising sea levels resulting from *global warming*, and
 - (f) to minimise the visual scale and bulk of development when viewed from the water, and
 - (g) to protect the public views and the visual amenity of the foreshore when viewed from the water by ensuring that native vegetation growth (trees, shrubs and groundcover species) along the foreshore is protected and enhanced, and
 - (h) to ensure that foreshore areas that are developed provide adequate areas for protecting and enhancing local native vegetation growth (trees, shrubs and groundcover species). This native vegetation growth should protect adjacent waterways from runoff and contribute to a habitat corridor (including by providing shelter and organic matter) for both terrestrial and aquatic ecosystems.

Botany Bay Local Environment Plan 1995

- 8) The objectives of this plan in relation to the *greenhouse* effect are:
- (a) to promote energy conservation measures and take account of *global warming* effects by providing appropriate controls and guidelines in the planning and development of the local government area of Botany Bay City, and
 - (b) to promote the adoption of waste minimisation and recycling principles and practices in the planning and development of the local government area, and
 - (c) to promote the growing and growth of trees to counter the *greenhouse* effect.

2.1.2. Mandatory considerations

Various provisions were located that required the *consideration* of climate change and its expected impacts when determining whether to approve a development consent. These are reproduced below:

Standard Instrument- Principal Local Environment Plan

- (2) Consent must not be granted to development on land that is wholly or partly within the coastal zone unless the consent authority has considered:
- (a) existing public access to and along the coastal foreshore for pedestrians or persons who are less mobile, with a view to:
 - (i) maintaining existing public access and, where possible, improving that access, and
 - (ii) identifying opportunities for new public access, and
 - (b) the suitability of the proposed development, its relationship with the surrounding area and its impact on the natural scenic quality, taking into account:
 - (i) the type of the proposed development and any associated land uses or activities (including compatibility of any land-based and water-based coastal activities), and
 - (ii) the location, and

- (iii) the bulk, scale, size and overall built form design of any building or work involved, and
- (c) the impact of the proposed development on the amenity of the coastal foreshore including:
 - (i) any significant overshadowing of the coastal foreshore, and
 - (ii) any loss of views from a public place to the coastal foreshore, and
- (d) how the visual amenity and scenic qualities of the coast, including coastal headlands, can be protected, and
- (e) how biodiversity and ecosystems, including:
 - (i) native coastal vegetation and existing wildlife corridors, and
 - (ii) rock platforms, and
 - (iii) water quality of coastal water bodies, and
 - (iv) native animals, fish, plants and marine vegetation, and their habitats, can be conserved, and
- (f) the effect of coastal processes and coastal hazards and potential impacts, including *sea level rise*:
 - (i) on the proposed development, and
 - (ii) arising from the proposed development, and
 - (g) the cumulative impacts of the proposed development and other development on the coastal catchment.

Botany Bay Local Environment Plan 1995

22 *Greenhouse effect, global warming, air and water pollution and energy efficiency etc*

The Council, before granting consent to any development that the Council is satisfied is in excess of \$250,000 in value (excluding land costs), or is of a type likely to give rise to significant soil, air, or water pollution, is to have regard to a study or studies addressing the following matters:

- (a) in relation to *global warming*:
 - (i) possible measures which could be incorporated within the development to reduce the consumption of non-renewable forms of energy and the production of *greenhouse* gases which contribute to the greenhouse effect,
 - (ii) whether any measures incorporated in the development designed to improve energy efficiency, to reduce the emission of *greenhouse* gases, or to respond to *global warming* are considered appropriate and adequate, and
- (iii) measures that have been taken to alleviate any possible adverse effects on the development as a result of climate change due to the *greenhouse* effect.

Sydney Local Environmental Plan 2005

Division 3 - Environmental design

27 Ecologically sustainable development

Before granting consent for development related to a building, the consent authority must have regard to the principles of ecologically sustainable development based on a "whole of building" approach by considering:

- (a) *greenhouse* gas reduction, and
- (b) embodied energy in materials and building processes, and
- (c) building design and orientation, and
- (d) passive solar design and daylighting, and
- (e) natural ventilation, and
- (f) energy efficiency and energy conservation, and
- (g) water conservation and grey water reuse, and
- (h) waste minimisation and recycling, and
- (i) reduction of car dependence, and
- (j) potential for adaptive reuse.

Wollongong City Centre Local Environmental Plan 2007

22E *Ecologically sustainable development*

Before granting consent for development, the consent authority must have regard to the principles of ecologically sustainable development as they relate to the proposed development based on a “whole of building” approach, by considering each of the following:

- (a) **greenhouse** gas reduction,*
- (b) embodied energy in materials and building processes,*
- (c) building design and orientation,*
- (d) passive solar design and day lighting,*
- (e) natural ventilation,*
- (f) energy efficiency and energy conservation,*
- (g) water conservation and water reuse,*
- (h) waste minimisation and recycling,*
- (i) reduction of car dependence,*
- (j) potential for adaptive reuse.*

Waverley Local Environmental Plan 1996

Division 4 *Environmental considerations*

21-Consumption of non-renewable resources and global warming

Consent must not be granted for development:

- (a) which involves the production of gases which contribute to the **greenhouse** effect unless the Council has considered whether conditions should be imposed on the consent aimed at reducing the production of those gases when the development is carried out, or*
- (b) which, in the opinion of the Council, will be likely to be affected by future **climate changes** or global warming unless the Council has considered whether conditions should be imposed on the consent in response to those likely changes or that warming.*

Warringah Local Environmental Plan 2000

Schedule 13 – Development guidelines for Collaroy/Narrabeen Beach

When assessing an application for consent to any such development, the Council must take into account the Collaroy/Narrabeen Coastline Management Plan 1997 (WC 1997), available at the office of the Council, and the State Government’s Coastline Management Manual (1990).

3 Principles

The Council will take the following principles into account when it assesses development:

- (a)*
 - (i) In this paragraph, "minor development" means works identified as exempt development in Schedule 1.*
 - (ii) Minor development should be appropriately sited having regard to the Hazard Zones marked on the Council’s Maps A1 8634 Sheets 1-3 and the aims of these guidelines.*
 - (iii) In the Zone of Wave Impact, consent may be granted for minor development and landscaping works, having regard to the aims of these guidelines.*
 - (iv) The Zone of Wave Impact is the area identified as such on the map.*
- (b)*

(i) In this paragraph, "major development" means all other development for which consent under [the Act](#) is required, but does not include engineered structures built or commissioned by a public authority for the purpose of erosion protection and mitigation.

(ii) Major development should be appropriately sited on allotments west (landward) of the Zone of Wave Impact and having regard to the Zones of Slope Adjustment and Reduced Foundation Capacity, as identified on a map available from the office of the Council.

(iii) The Hazard Zones are to be marked on all plans submitted to the Council.

(iv) In the Zone of Wave Impact, major development will not be permitted. This includes structures which extend out over the Zone of Wave Impact or into the air space above the Zone of Wave Impact.

(v) In the Zone of Slope Adjustment, structures are to be supported on piles to withstand loads which may be induced in the pile by slumping of the soil face.

(vi) In the Zone of Reduced Foundation Capacity, structures are to be supported on piles to withstand loads which may be induced in the pile by slumping of the soil face.

(vii) In the Zone of Stable Foundation, as identified on a map available from the office of the Council, conventional foundation design may be permissible, depending on proximity to Hazard Zones.

(viii) Criteria for structural pile design for residential development is detailed in *Criteria for the Siting and Design of Foundations for Residential Development*, February 1991, Geomarine Pty Ltd and Coffey Partners International Pty Ltd, Report No 69021 R02. This report is a design guide only and detailed design of piling should be undertaken in accordance with these guidelines.

(ix) A suitably qualified engineer must undertake the geotechnical/ structural design of the foundations in accordance with the report referred to in subparagraph (viii) and these guidelines.

(x) Unless demonstrated as being adequate to the Council's satisfaction, piling must extend to a depth below 1 metre AHD in the Zones of Slope Adjustment and Reduced Foundation Capacity.

(xi) Piling requirements for major development extend to the whole structure, with any part of the structure located east (seaward) of the Zone of Stable Foundation.

4 Conditions of approval or consent

Any approval or consent will include the following condition:

"The applicant/owner is to minimise the amount of sand removed from the property during construction. If sand is removed from the site during construction, it may be placed on the beach reserve in accordance with the direction of the Council's Environmental Officers."

5 Advice to be included with approvals or consents

The following advice is to be included with all consents and approvals:

"This property is on land located in an area where there is likely to be a risk of coastal erosion and wave impact during severe storms. The risk to the property may increase with time due to long-term beach recession caused by greenhouse induced **sea level rise** or natural coastal processes.

To reduce the potential impact to your property, the Council strongly recommends that effective precautions be taken to ensure adequate volumes of sand are maintained within the eastern (seaward) boundary of your property. The Council requires that only free-draining, clean, yellow sand be used to fill allotments."

6 Special conditions

For non-residential major development, the applicant is to have regard to the requirements for major development given in item 3 (b) of these guidelines and, in addition, is to provide advice from a suitably qualified engineer, detailing piling design for the structure, capable of withstanding coastal processes such as wave impact and coastal erosion, affecting the Collaroy/Narrabeen Beach.

2.2. Provisions in NSW and Commonwealth Acts and Regulations.

1. Environment Protection and Biodiversity Conservation Act 1999(Cth)

2) The regulations may prescribe penalties for offences against the regulations. A penalty must not be more than 50 penalty units.

(3) Regulations may be made for and in relation to giving effect to any of the following agreements:

- (a) the Apia Convention;
- (b) the Convention for the Protection of the Natural Resources and Environment of the South Pacific (the SPREP Convention) signed at Noumea on 24 November 1986;
- (c) the Bonn Convention;
- (d) CAMBA;
- (e) JAMBA;
- (f) an agreement between the Commonwealth and one or more other countries relating to whales;
- (g) the World Heritage Convention;
- (h) the Ramsar Convention;
- (i) the Biodiversity Convention;
- (j) CITES;
- (k) the Framework Convention on *Climate Change* done at New York on 9 May 1992.

2 -Renewable Energy (Electricity) Act 2000 (Cth)

S3- The objects of this Act are:

- (a) to encourage the additional generation of electricity from renewable sources; and
- (b) to reduce emissions of *greenhouse* gases; and
- (c) to ensure that renewable energy sources are ecologically sustainable.

3. National Greenhouse and Energy Reporting Act 2007 (Cth)

The Act contains 254 references to 'greenhouse'. These will not be reproduced here. The full Act is available at: [http://www.comlaw.gov.au/ComLaw/Legislation/Act1.nsf/0/DCFE2ACF75DF47B7CA25736A00212891/\\$file/1752007.pdf](http://www.comlaw.gov.au/ComLaw/Legislation/Act1.nsf/0/DCFE2ACF75DF47B7CA25736A00212891/$file/1752007.pdf)

4. Electricity Supply Act 1995 (NSW)

The Act contains 36 references to 'greenhouse' and 2 references to 'climate change'. These will not be reproduced here. The full Act can be found at: http://www.austlii.edu.au/au/legis/nsw/consol_act/esa1995242/

5. Energy and Utilities Administration Act 1987 (NSW)

The Act contains 1 reference to 'greenhouse' and 9 references to 'climate change' including:

34F Purposes of *Climate Change* Fund

The purposes of the Fund are as follows:

- (a) to provide funding to reduce greenhouse gas emissions and the impacts of *climate change* associated with water and energy activities,
- (b) to provide funding to encourage water and energy savings and the recycling of water,
- (c) to provide funding to reduce the demand for water and energy, including addressing peak demand for energy,
- (d) to provide funding to stimulate investment in innovative water and energy savings measures,

- (e) to provide funding to increase public awareness and acceptance of the importance of **climate change** and water and energy savings measures,
- (f) to provide funding for contributions made by the State for the purposes of national energy regulation.

6. Threatened Species Conservation Act 1995(NSW)

Schedule 3 Key threatening processes

Anthropogenic *Climate Change*

7. Water Management Act 2000 (NSW)

43A Extension of duration of management plan dealing with water sharing

- (3A) If a report of the Natural Resources Commission under subsection (3) recommends changes to a management plan that will result in a reduction of water allocations in relation to which compensation might be payable under section 87AA, the Commission is to state in the report whether the purpose of the proposed changes is:
 - (a) to restore water to the environment because of natural reductions in inflow to the relevant water source, including but not limited to changes resulting from *climate change*, drought or bushfires, or
 - (b) to provide additional water to the environment because of more accurate scientific knowledge that demonstrates that the amount previously allocated to the environment is inadequate.

46 Making or amendment of management plan

- (1) If the Minister makes a replacement management plan or amends a management plan and the replacement plan or amendment will result in a reduction of water allocations in relation to which compensation might be payable under section 87AA, the Minister is to include in the order in which the replacement plan or amendment is made, or in another order, a statement as to whether:
 - (a) the purpose of the reduction to water allocations is to restore water to the environment because of natural reductions in inflow to the relevant water source, including but not limited to changes resulting from *climate change*, drought or bushfires, or
 - (b) the purpose of the reduction to water allocations is to provide additional water to the environment because of more accurate scientific knowledge that demonstrates that the amount previously allocated to the environment is inadequate, or
 - (c) the reduction to water allocations results from a change in government policy.

87AA Compensation payable in certain circumstances for reductions in water allocations arising after initial period that management plan is in force

- (3) Despite subsection (2), the holder of an access licence is not entitled to compensation under this section if:
 - (a) the reduction in water allocations occurred while the first management plan (excluding any period for which that plan was extended under section 43A (1)) was in force, or
 - (b) the reduction in water allocations occurred as a result of an amendment of a management plan by the Minister under section 45 that is authorised by the plan or that is required to give effect to a decision of the Land and Environment Court relating to the validity of the plan, or
 - (c) the reduction in water allocations is for the purpose of restoring water to the environment because of natural reductions in inflow to the water source, including but not limited to changes resulting from *climate change*, drought or bushfires.

2.3. Policies

1. NSW Coastal Policy 1997

Part A- A sustainable future for the New South Wales Coast.

The Coastal Policy uses the precautionary principle as an integrating mechanism for considering and addressing a range of issues in the coastal zone.

*The precautionary principle should be used at the project level, for example in assessing development applications in areas prone to shoreline recession, and at the strategic level, for example in the development of coastline management plans and local environmental plans. The precautionary principle is particularly relevant to the issue of **climate change and sea level rise** in coastal areas.*

While the precautionary principle does not require a ‘no development’ approach, it does require a risk averse approach to decision-making, especially where locational considerations are critical or where environmental impacts are uncertain but potentially significant.

*Investigations and monitoring of **climate change** for coastal areas will continue and sea level rise scenarios will be incorporated into management plans and other mechanisms, where appropriate.*

Part B- Implementation

Objectives

2.2. Objective: *To recognise and consider the potential effects of **climate change** in the planning and management of coastal development.*

2.2.2. *Appropriate planning mechanisms will be considered for incorporating **sea level change** scenarios set by the Inter-governmental Panel on **Climate Change**.*

B: Principles underlying the Policy

*Natural processes are affected by global **climate change** and the greatest impact is at the land-sea interface.*

*The precautionary principle should be used in the assessment of natural hazard issues, including **climate change and sea level rise**.*

Application of the Policy:

*While most of the strategic actions of the policy could apply irrespective of location, the location and the issue under consideration will mean that some provisions are more relevant than others. For example, a planner dealing with a development application for a townhouse development in the littoral coastal sub-zone at Ballina would need to use the Coastal Policy in a different way to a planner preparing an amending LEP for a site upstream on the Shoalhaven River. In the first case, provisions relating to shoreline recession and **climate change** might be directly relevant, whereas in the second case, provisions relating to estuarine water quality and, possibly, biodiversity are likely to be most relevant.*

2. NSW Coastline Management Manual: September 1990.

3.5.8 Climate Change: Planning Under Uncertainty

Having considered the range of management options which might be applied to an area, and before attempting to make a final selection of the most appropriate, the impact of likely variations in assumptions made and of possible *climatic changes* should be considered. The *sea level rise* that might accompany atmospheric changes is the most discussed but is only one of a number of uncertain factors that might affect the implementation of a particular management strategy. In respect of *climate change* there is no current engineering basis for the adoption of a particular scenario, but the effects of any chosen scenarios can be assessed.

The variations in possible scenarios that might be considered are largely a matter of sound planning judgment. The Government will continue to monitor the results of scientific research and will make available to councils the most up to date assessment of the position at any given time.

The preparation of a coastline management plan is made difficult by uncertainties in the estimates of coastal processes and their hazards and by uncertain future conditions, e.g. the magnitude of any postulated future *sea level rise*.

3. NSW Metropolitan Strategy

E. Environment and Resources

The Metropolitan Strategy addresses Sydney's environmental challenges and supports rural industries. It includes actions to protect the loss of biodiversity, protect air quality, manage with less water, move towards cleaner energy, protect viable agricultural and resource lands, and respond to the risk of *climate change*.

E 3.3.

Use energy efficiently and reduce *greenhouse* intensity of energy supply

Increase renewable energy generation, *greenhouse* target for 60% reduction in emissions by 2050 and return to 2000 levels by 2025. BASIX target: 40% reduction in energy consumption/*greenhouse* gas emissions.

4. NSW Biodiversity Strategy

Objective 3.6. Assess and manage the potential impacts of climate change

Current scientific evidence suggests that the Earth's climate is gradually changing, above what may be expected through natural change, as a result of human activities. Although the extent and timing of *climate change* remains uncertain, we need to be prepared for the variety of predicted long-term impacts. Global *climate change* has the potential to significantly affect biodiversity. It may cause changes in population sizes and the distribution of species, modify the species composition of habitats and ecosystems and alter the geographical extent of habitats and ecosystems.

Supporting actions

50. Continue to monitor the rate and impact of *climate change* on biodiversity at global and regional scales, incorporating information from community and Aboriginal groups where appropriate.

51. Undertake research into the potential impacts of *climate change* on species, populations and ecosystems and secondary effects, such as altered fire regimes and conditions that may favour spread of pathogens or introduced species, and identify practical options for addressing such impacts.

52. *Modify conservation strategies and practices to compensate for changing climatic conditions and their effects on biodiversity, noting in particular the importance of native vegetation retention and revegetation as a means of preserving existing carbon sinks.*

53. *Determine priorities for the management of species and ecological communities which are likely to be threatened by climate change.*

54. *Investigate the capacity of protected areas to sustain their biodiversity in the event of **climate change** and, where possible, ensure that altitudinal and latitudinal buffer zones or corridors exist to allow for the movement of organisms in the event of shifts in climatic zones. This will require careful consideration of reserve design principles in conjunction with conservation planning and management implications.*

5. NSW Greenhouse Plan

The NSW Greenhouse Plan contains 101 references to ‘climate change’ and 297 references to ‘greenhouse’. These will not be reproduced here. The full Plan is available at:

http://www.greenhouse.nsw.gov.au/climate_change_in_nsw/climate_change_in_nsw_links/nsw_greenhouse_plan

6. National Greenhouse Strategy

The National Greenhouse Strategy contains 210 references to ‘climate change’, 596 references to ‘greenhouse’ and 2 mentions of ‘sea level rise’.

The full strategy is available found at:

<http://www.greenhouse.gov.au/government/ngs/index.html>

7. NSW State Plan- a new direction for NSW

The NSW State Plan contains numerous references to ‘climate change’ and ‘greenhouse’. It can be viewed at the following link:

<http://www.nsw.gov.au/stateplan/index.aspx?id=3fa4b747-8a40-4795-b789-2067946487f5>

8. Draft Central Coast Regional Strategy

WATER

*The Central Coast is currently experiencing its worst drought on record. Combined with the changes predicted to occur as a result of **climate change**, developing a safe and secure water supply without compromising the health of the Region’s water sources is one of the greatest challenges that the Region faces.*

ENVIRONMENT

*The continued demand for new housing within the constrained geography of the Region could place pressure on the Central Coast’s biodiversity. The North Wyong Shire Structure Plan Area has land within the catchments of Lake Macquarie and Tuggerah Lakes, the Porters Creek wetland and includes a significant east–west regional biodiversity corridor. Planning in this area, and throughout the Region, needs to minimise impacts on these values and ensure future residents are not at risk from hazards such as flooding, coastal erosion, bushfire and changes due to **climate change**. Existing development is*

also concentrated along the coastline and coastal waterways and already places pressure on these environments.

The key environmental challenges include:

providing a sustainable long-term water supply

providing a balance between future development and important conservation values

improving identification, protection and enhancement of natural environments including significant biodiversity corridors, regionally significant vegetation, coastal lakes and estuaries, and landscape values

improving understanding of Aboriginal cultural heritage values and incorporating this information within land use planning and natural resource management processes

accepting the value of rural lands as food-producing lands and ensuring the long term protection of these assets

*managing natural hazards in new developments, namely flooding, coastal erosion and inundation (including the impacts of **climate change**), land instability, bushfire and acid sulphate soils.*

NATURAL HAZARDS

The draft Central Coast Regional Strategy recognises that some areas may be subject to the effects of natural hazards such as flooding, coastal inundation and recession which are closely linked to the coastline, estuaries and foreshore areas of coastal lakes.

These areas are also subject to some of the Region's greatest development pressures. Existing and future development within the Region faces varying degrees of risk from natural hazards. Preparation and future reviews of Floodplain and Coastline Management Plans must consider the potential for these risks to increase as a result of *climate change*, including *sea level rise*.

The Coastal Protection Act 1979 requires councils to prepare Coastal Zone Management Plans using the NSW Government's Coastal Zone Management Manual. These management plans will form the basis for the consideration of impacts of new land releases, proposed rezoning and existing developments in areas subjected to hazards. These risks may increase due to *sea level rise* and more frequent and intense storms associated with *climate change*.

The Floodplain Development Manual covers the management of flood liable land and defines the NSW Government's Flood Prone Land Policy. The manual aims to reduce the impact of flooding on landowners and property. Councils must incorporate processes and planning provisions in LEPs consistent with the Floodplain Development Manual, including preparation of Floodplain Management Plans.

In an area that has such substantial vegetated areas and a dispersed population there is a high risk of bushfires. Planning for bushfire protection is undertaken in accordance with Government policy. Similarly, the management of acid sulphate soils must be undertaken in accordance with Government policy.

9. North Coast- Far North Regional Strategy

ENVIRONMENT

The environmental challenges of the Region are to:

- *improve protection and enhancement of environmental assets (including wetlands, littoral rainforest, koala habitat, and estuaries), biodiversity and landscape values*
- *improve understanding of Aboriginal and European cultural heritage values and the incorporation of this information within land use planning and natural resource management processes*
- *ensure sustainable management of, and access to, natural resources, and protection of rural landscapes from increased settlement*
- *ensure better understanding and management of natural hazards, including flooding, coastal erosion and inundation (including the impacts of **climate change** on these), land instability, bushfire and acid sulfate soils.*

COASTAL HAZARDS

Parts of the Region are subject to natural hazards and processes that can pose risks to life and property, including:

- *flooding*
- *coastal hazards involving beach erosion, shoreline recession, coastal inundation, and slope and cliff instability*
- *bushfire hazard*
- *disturbance of acid sulfate soils*
- *landslip*
- ***climate change** impacts and the potential increased risks associated with **sea level rise**, flooding and coastal hazards.*

*These susceptible areas are often also subject to some of the Region's greatest development pressures. Existing and future development within the Region faces varying degrees of risk from natural hazards. The potential for these risks to increase under **climate change** (including **sea level rise**) must be considered in any assessment of new developments within Town and Village Growth Boundaries. In February 2006, the Council of Australian Governments announced its Plan for Collaborative Action on **Climate Change**. The Council of Australian Governments' **Climate Change** Group is now currently preparing the National **Climate Change** Adaptation Framework.*

*Adaptation is a way of preparing for a changing climate to manage the risks and maximise opportunities. Long term **climate change** is likely to present new challenges that will demand careful analysis and innovative solutions.*

OUTCOMES

The Strategy seeks to ensure future urban development is not located in areas of high risk from natural hazards including sea level rise, coastal recession, rising water tables and flooding. Development in areas subject to these natural hazards is to be assessed according to the strict criteria specified in both the Floodplain Development Manual and Coastal Zone Management Manual. The Department of

*Planning will support the capacity of local councils and the catchment management authority to plan for **climate change**.*

ACTIONS

- *In order to manage the risks associated with **climate change**, councils will undertake investigations of lands with the potential to be affected by **sea level rise** and inundation to ensure that risks to public and private assets are minimised.*

10. Draft Mid North Coast Regional Strategy

ENVIRONMENT

*Some areas in the Region are subject to natural hazards such as acid sulfate soils, flooding, and coastal inundation and recession. These issues need to be carefully managed when considering future development particularly in light of the potential coastline changes associated with **climate change**.*

*The Region's coastal lakes and lagoons typically have intermittently open entrances to the ocean. The lakes are unique in their biodiversity and their ecological and physical processes. They can alternate between freshwater and saltwater regimes. These lakes are highly susceptible to impact from **climate change** and urban activities.*

NATURAL HAZARDS

*Flooding is a major hazard that may result in community dislocation and substantial economic and social costs. The Floodplain Development Manual (2005) defines the NSW Government's Flood Prone Land Policy. The manual outlines the process for councils to develop a flood risk management plan. The aim is to reduce the impact of flooding. The plans should consider the potential for risks to increase under **climate change** (including **sea-level rise** and more frequent and more intense storm events).*

*In February 2006, the Council of Australian Governments announced its Plan for Collaborative Action on **Climate Change**. The Council of Australian Governments **Climate Change** Group is currently preparing the National **Climate Change** Adaptation Framework. Adaptation is a way of preparing for a changing climate to manage the risks and maximise opportunities. Long term climate change is likely to present new challenges that will demand careful analysis and innovative solutions. Other hazards may include bushfire, acid sulfate soil disturbance and landslip.*

OUTCOMES

*Future urban development will not be located in areas of high risk from natural hazards including **sea level rise**, coastal recession, rising water tables and flooding. Development in areas subject to natural hazards will be assessed according to the policies of the Floodplain Development Manual and Coastal Zone Management Manual. Appropriate planning provisions will be incorporated in local environmental plans consistent with the Floodplain Development Manual and council's risk management plan to minimise the risk from flooding.*

ACTIONS

*In order to manage risk associated with **climate change**, councils will undertake flood investigations over lands with the potential to be affected by **sea-level rise** and inundation to ensure that risk to public and*

private assets are minimised. Local environmental plans will make provision for adequate setbacks in areas of coastal erosion risk and ocean-based inundation in accordance with Coastal Zone Management Plans. Until the above plans and investigations are complete, councils will not zone land or approve new development or redevelopment in potential hazard areas, unless assessed within a risk assessment framework adopted by the council.

Zoning of land for future development within the catchments of coastal lakes (as defined in Schedule 1 of State Environmental Planning Policy No. 71—Coastal Protection) must consider a coastal lake sustainability assessment if one has been prepared.

Local environmental plans will zone areas subject to high hazard to reflect the limitations of the land.

11. Lower Hunter Regional Strategy

Outcomes

*Future urban development will not be located in areas of high risk from natural hazards, including **sea level rise**, coastal recession, rising watertable and flooding. Development in areas subject to natural hazards will be assessed according to the policies of the Floodplain*

Development Manual and the Coastal Protection Act 1979. Appropriate planning provisions will be incorporated in local environmental plans consistent with the Floodplain Development Manual and council's risk management plan to minimise the risk from flooding.

Actions

*In order to manage risk associated with **climate change**, councils will undertake flood investigations of lands with the potential to be affected by **sea level rise** and inundation to ensure that risk to public and private assets are minimised.*

Development in areas subject to natural hazards will be assessed according to the policies of the Floodplain Development Manual and the Coastal Protection Act 1979. Appropriate planning provisions will be incorporated in local environmental plans consistent with the Floodplain Development Manual and council's risk management plan to minimise the risk from flooding.

12. South Coast Regional Strategy

ENVIRONMENT

Protecting the highly significant diverse natural assets and associated biodiversity is a key challenge for the Strategy. The Region also has an abundance of natural resources, such as State forests, surface and groundwater, extractive material (e.g. hard rock and sand) and fertile soils which, as part of the regional economy, require careful management.

Population growth and the resulting demand for new housing and employment lands could lead to increased pressure on regional biodiversity, water supply catchments, soil, riparian corridors, coastal lakes and waterways. Proper consideration and improved management of areas of high biodiversity, scenic, resource and cultural value are vital if the Region's significant environmental assets and cultural heritage are to be protected for future generations.

As more and more people seek rural residential lifestyles, there is associated pressure on rural landscapes

creating the potential for land use conflict with traditional agricultural practices. Agricultural land is increasingly valued for residential purposes rather than for agriculture. Identifying and securing productive agricultural lands from development pressures is a major challenge for the Region.

The environmental challenges include:

- improved protection and enhancement of natural environments including biodiversity, coastal lakes and estuaries and landscape values*
- improved understanding of Aboriginal cultural heritage values and incorporating this information within land use planning and natural resource management processes*
- ensuring sustainable management and access to natural resources and protection of rural landscapes from increased settlement*
- better understanding and management of natural hazards, namely flooding, coastal erosion and inundation (including the impacts of **climate change** on these), land instability, bushfire hazard and acid sulfate soil.*

NATURAL HAZARDS

Parts of the Region are subject to natural hazards and processes that can pose risks to life and property, namely:

- flooding*
- coastal hazards involving beach erosion, shoreline recession, coastal inundation, slope and cliff instability*
- **climate change** and the potential increased risks associated with **sea level rise**, flooding and coastal hazards*
- bushfire hazard*
- disturbance of acid sulfate soils*
- land slip. Planning processes have been developed to identify the risks associated with flooding and coastal hazards and how they can be minimised through land use planning. These risks may increase due to **sea level rise** and more frequent and intense storms associated with **climate change**. Flood Risk Assessments have been developed to assist councils to prioritise flood-planning processes.*

The NSW Coastal Policy requires coastal hazards to be managed in an ecologically sustainable way and promotes a precautionary approach to decision-making. As a general principle new development should not be permitted in areas that might in future be subject to coastal hazards.

OUTCOMES

The Regional Strategy prevents future urban development from being located in areas at high risk from natural hazards.

ACTIONS

- Council shall undertake flood investigations that consider the risks associated with **climate change** and Floodplain Risk Management Plans shall be prepared. Draft LEPs must be consistent with Flood Risk Management Plans.*
- LEPs shall make provisions for adequate setbacks in areas of coastal erosion risk and ocean-based inundation in accordance with Coastal Zone Management Plans.*
- Until the above plans are made by the councils (for Floodplain Risk Management Plans) and the Minister for Natural Resources (for Coastal Zone Management Plans), councils cannot zone land or approve new development in potential hazard areas in isolation, unless assessed within a risk assessment framework adopted by the council.*

13. Subregional strategies

Provisions from the 6 draft sub-regional strategies that reference climate change will not be reproduced. However, those strategies that have been finalised can be found at the following links:

East Draft Subregional Strategy

<http://www.metrostrategy.nsw.gov.au/dev/ViewPage.action?siteNodeId=81&languageId=1&contentId=483>

South Draft Subregional Strategy

<http://www.metrostrategy.nsw.gov.au/dev/ViewPage.action?siteNodeId=81&languageId=1&contentId=559>

Inner North Draft Subregional Strategy

<http://www.metrostrategy.nsw.gov.au/dev/ViewPage.action?siteNodeId=81&languageId=1&contentId=552>

North Draft Subregional Strategy

<http://www.metrostrategy.nsw.gov.au/dev/ViewPage.action?siteNodeId=81&languageId=1&contentId=556>

North East Draft Subregional Strategy

<http://www.metrostrategy.nsw.gov.au/dev/ViewPage.action?siteNodeId=81&languageId=1&contentId=553>

South West Subregional Strategy

<http://www.metrostrategy.nsw.gov.au/dev/ViewPage.action?siteNodeId=81&languageId=1&contentId=554>