



# Coastal climate change risks – a national policy?

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A number of recent Court decisions throughout Australia have highlighted the growing importance of taking into account coastal climate change (CCC) risks when development is being planned in coastal areas. CCC risks include:

- more frequent inundation of coastal infrastructure and settlement leading to increased damage, cost to households and more regular disruption to service delivery in the areas affected by flooding;
- damage to coastal ecosystems;
- reduced asset life from accelerated erosion and degradation of coastal land;
- loss of public and private land through erosion and permanent inundation; and
- greater expenditure on asset repair and maintenance.

## NEW SOUTH WALES

In *Aldous v Greater Taree City Council* [2009] NSWLEC 17 the Court considered the ecologically sustainable principle and, in particular, the risk of climate change induced coastal erosion. The Court reviewed the council's decision which granted development consent for the construction of a new dwelling on a beachfront property on the central coast. As there was documentary evidence that the council took the issue of erosion due to CCC seriously in preparing a coastal management plan, the council's approval of the development was upheld.

## VICTORIA

The Victorian Civil and Administrative Tribunal's decision in *Gippsland Coastal Board v South Gippsland Shire Council* [2008] VCAT 1545 dealt with the risks associated with rising sea levels and coastal inundation in considering a development application. The Tribunal stressed the importance of CCC in the planning process. It considered expert evidence on predicted levels of sea rise. It applied the 'precautionary principle' that increases in storm severity and rising sea levels created a foreseeable risk of inundation of the development land. This risk contributed to the conclusion that the proposed residential development not be approved.

In *Ronchi v Wellington Shire Council* [2009] VCAT 1206, the Tribunal reviewed a council decision to grant a permit for two dwellings

Coastal climate change policy has ramifications for developers in NSW



in a coastal town, Seaspray. The land was in an area subject to a policy which applies where there is risk of sea inundation due to CCC. The Tribunal affirmed that there is an onus on decision-makers to take CCC risks into account not only in strategic planning but also in each development application. A precautionary approach should be adopted. As the proposed development would result in elevated risks of rising sea levels, the council's decision to grant the permit was overturned. The Tribunal suggested to the developer that a new application which in its design took into account CCC risks might be approved.

In *Owen v Casey City Council* [2009] VCAT 1946, the Tribunal affirmed the need for a coastal hazard assessment when applying for a building permit. This assessment was required to take into account the risk of inundation due to CCC. Although the proposal in this case was only for two dwellings, the applicant was required to submit a coastal hazard vulnerability assessment.

## SOUTH AUSTRALIA

In *Northcape Properties v District Council of Yorke Peninsula* [2008] SASC 57 the SA Supreme Court upheld a council's decision to refuse a development application for an 80-lot residential subdivision on the ground that the development assessment had failed to take into account the erosion of the coastline predicted to be the result of rising sea levels. The development involved a subdivision of land which was subject to a planning policy which had strong coastal and hazard protection requirements. In particular, the planning policy required specific consideration of the sea levels in the first 100 years of the development's life. Expert evidence was tendered to prove that the coast might move 35 to 40 metres inland over the next 100 years. Development consent was refused as the proposal

offended many of the goals and objectives of the relevant development plan which included specific provisions for coastal development on the Yorke Peninsula.

## COASTAL CLIMATE CHANGE RISKS REPORT

A report delivered in April to the federal Department of Climate Change and Energy Efficiency entitled *Coastal Climate Change Risks – Legal and Policy Responses in Australia* refers to such legal cases. The report notes that under our federal governance arrangements, state and territory governments are responsible for matters concerning coastal land management, including developing policy and regulatory frameworks for managing CCC risks. Within each state or territory a range of agencies gives effect to these responsibilities and the day to day management of coastal areas. In particular, local councils play a crucial role in coastal management, including implementing coastal climate change adaption strategies through functions such as planning, development and control, drainage and land management. The difficulties faced by local government in carrying out these responsibilities is evidenced by growing litigation in response to council decisions in the CCC context, as referred to above. The report observes that there is a strong call from local government for a national approach.

The report suggests that NSW has the most advanced regulatory treatment of CCC risk. Only Queensland and NSW have coastal legislation with specific climate change references. Since 2010 the *NSW Coastal Protection Act 1979* has required climate change to be taken into account in preparing the local coastal zone management plans.

As to future directions, the report cites comments from a recent Productivity Commission report on Australia's planning system (2011):



*"The regulations and agencies involved in planning, zoning and development assessments constitute one of the most complex regulatory regimes operating in Australia. This regulatory system is not like other regimes which have a clearer delineation between policy making, regulation writing and administration. Because some important policy issues are not fully resolved during strategic and structure planning, de facto policy-making occurs during development assessment and rezoning where significant discretion is exercised. In addition, the planning and zoning regime also has a number of 'special' agencies and processes as an alternative to the standard path to development approval at the local council level."*

Clearly, much is left to individual councils when exercising discretions. This is regarded as unsatisfactory. While land use planning is inherently a case-by-case matter, a lack of clear decision-making policy framework results in an ad hoc approach to the consideration of CCC risks. This can lead to inconsistency in decision making, uncertainty and the possibility of legal challenge. This final concern can be seen in the case of *Walker v Minister for Planning* [2007] NSWLEC 741 and its subsequent Court of Appeal decision in *Minister for Planning v Walker* [2008] NSWCA 224 which overturned the ruling in the NSW Land and Environmental Court. At first instance, Biscoe J rejected a residential development application because the Minister for Planning had failed to consider, when assessing the concept plan, whether the existing flood risk would be aggravated by CCC if the development was to proceed. However, on appeal, the NSW Court of Appeal found that the failure to consider climate change in the public's interest does not necessarily



## THE REPORT SUGGESTS THAT NEW SOUTH WALES HAS THE MOST ADVANCED REGULATORY TREATMENT OF CCC RISK.

constitute a breach of the Minister's obligation. Therefore, the Minister for Planning's approval was not invalidated.

The *Coastal Climate Change Risks* report unsurprisingly recommends that there should be a national approach which would need to be discussed at all levels of government. The report recommends that a national approach could include:

- development of policy options, including having national standards (such as for sea level rise benchmarks), guidance on the scope of issues that a well-developed CCC policy should address, clearer delineation of roles and responsibilities and guidance on the relative weight that CCC risks should be given in land use planning decisions;
- engagement with state and territory governments for the benefit of consolidation of CCC policies where they are contained in separate documents, measures to address CCC risks becoming mandatory in primary legislation, aligning CCC portfolio responsibilities to increase consistency and coordination of response to CCC risks, taking a consistent approach to when public funds will be used for coastal protection works; and

- engagement with the wider community on the options for managing CCC risks to existing settlements and the circumstances in which such policies might be appropriately implemented.

The report delivers in a convenient form the information needed to consider how CCC risks should be addressed and managed in the planning process. The report does not provide complete answers but indicates that a national policy consistently applied through state legislation should enhance the policy-making issues, minimise inconsistent decision making and reduce the prospect of successful legal challenge. Given that, particularly in NSW, the development industry must accept that CCC risks will need to be factored into any development proposal involving coastal land, the report is to be welcomed if it assists creating certainty in this area. This will benefit the planning teams engaged by developers as they prepare applications for development within affected areas.

Overall, the industry should welcome the report and its general direction but obviously the industry will be concerned as to the responses to the report by government at all levels. In particular the industry will be keen to see that proposals are implemented to facilitate development, especially through increasing predictability and certainty. The industry should be vigilant to challenge any proposals which, while pursuing desirable ends, create additional barriers to development through substantial additional costs, delay and perhaps over-engineered policies which might render outcomes difficult or not commercially viable. ▀