Griffith UNIVERSITY

Climate Change: What Are Local Governments Liable for?

Philippa England

Urban Research Program

Issues Paper 6
March 2007

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Introduction

In the face of increasingly certain scientific evidence, concerns about greenhouse gas emissions and climate change impacts are rising dramatically. The 2006 *Stern Report on the Economics of Climate Change*, and others like it, increasingly draw attention to the need to take into account the impacts of climate change across a wide range of economic and political activities. Local governments are at the forefront of many activities that both contribute to climate change and are likely to be impacted upon by climate change. This paper examines their responsibilities at law to deal with climate change considerations when exercising their functions and powers.

In the context of climate change, the decisions of local governments may be legally challenged on two general grounds. First, decisions that contribute to greenhouse gas emissions, for instance, development approvals for power stations or other polluting activities – are likely to come under increasing scrutiny. The decision in *Gray v Minister for Planning* [2006] NSWLEC 720 has opened the door for judicial review of decisions that fail to take into account the effects of a development approval on greenhouse gas emissions. Secondly, local governments are at risk of incurring legal liability if they *unreasonably fail to take into account the likely effects of climate change* when exercising a wide range of their service, planning and development activities. At the current time, the threshold of unreasonableness is high – but over time the range of actions that may qualify as highly unreasonable is likely to expand. This paper explores the current state of play in both these areas of potential legal liability for local governments. The over-riding message is that the situation is moving very rapidly and so, undoubtedly, is the relevant law. Local governments need to be vigilant to ensure their policies and programs, across a wide range of activities, reflect a reasonable response to the risks of climate change.

Local government liability for decisions contributing to climate change

Why sue local governments for causing climate change? Surely there are bigger fish to fry? The Commonwealth, state governments and big multinational companies spring to mind. To date, even these actors have evaded responsibility for their contributions towards climate change. The reasons normally given relate to either – insufficient evidence of causation and /or judicial abstention from legislative policy- making. For instance, in the recent case of *Wildlife Whitsundays v Minister for Environmental Heritage* [2006] FCA 736, the Wildlife Preservation Society of Queensland sought judicial review of a ministerial decision made pursuant to s.75 of the Commonwealth's *Environment Protection and Biodiversity Conservation Act* (1999) (EPBC Act). The Minister's delegate had determined that proposals to build two new coal mines in central Queensland did not amount to "actions affecting matters of national environmental significance" and did not therefore need to be reviewed by the Minister under the EPBC Act (as controlled actions).[1] The plaintiff's case was that, should they be approved, these projects would make a significant contribution to greenhouse gas emissions. The expected output from these two new mines is 48 million tonnes of coal.

[1] The EPBCA, 1999, Cth, contains a list of matters of national environmental significance including – world heritage properties; nuclear actions; the national heritage etc but not climate change per se.

The reasons given by the Minister's delegate for not assessing the proposals under the EPBC Act included:

- The possibility of increased concentration of greenhouse gases in the atmosphere resulting from each project was speculative and merely 'theoretically possible'.
- There was no suggestion that the *mining* of coal pursuant to these proposals would increase the amount of coal burnt in any particular year, or cumulatively.
- It was not suggested that in the absence of coal from these sources, less coal would be burnt.
- If there were any such increased emissions, the additional impact on protected matters would be very small and therefore not significant.

The action failed. Instead of applying the precautionary principle, Justice Dowsett, in the Federal Court of Australia, upheld the reasons of the Minister's delegate and held that the potential contribution of these developments to global warming did not, in this instance, amount to a 'likely significant impact on the environment' for the particular purposes of the EPBC Act. Justice Dowsett also ruled the evidence was not sufficient to demonstrate that either project would cause serious or irreversible environmental damage (para [54]).

The second line of judicial reasoning (other than outright denial) is illustrated by the American case of *Massachusetts et al v EPA*, (415 F 3d 50 (DC Circ. 2005). In this case, the US Federal Appeals court in Washington DC heard a case brought by over two dozen American states, NGOs and others against the US Environmental Protection Agency for failing to regulate greenhouse gases under the Clean Air Act. The case was dismissed as involving a non-justiciable, political question:

> Looking at the past and current actions (and deliberate inactions) of Congress and the Executive within the United States and globally in response to the issue of climate change merely reinforces my opinion that the questions raised by Plaintiffs' complaints are non-judiciable political questions.
>
> Because resolution of the issues presented here requires identification and balancing of economic, environmental, foreign policy, and national security interests, "an initial policy determination of a kind clearly for non-judicial discretion" is required. (Vieth, 541 U.S. at 278)[2]

These cases must now be viewed with extreme caution in the light of the decision in *Gray v the Minister for Planning* [2006] NSWLEC 720. In this case, a private individual successfully challenged the adequacy of an environmental impact assessment for a proposed major new coal mine. The plaintiff successfully argued that, in failing to take into account the downstream/eventual contributions to greenhouse gas emissions that would result from the burning of coal produced at the mine, the environmental assessment report was inadequate. If it goes ahead, the proposed open cut mine will produce up to 10.5 million tonnes of coal per annum for burning in coal fueled power stations in NSW and overseas. In delivering her decisions, her honour Justice Pain made the following comments:

[2] For more information see www.climatelaw.org; www.climatelawsuit.org

> Climate change/global warming is widely recognised as a significant environmental impact to which there are many contributors worldwide but the extent of the change is not yet certain and is a matter of dispute. The fact there are many contributors globally does not mean the contribution from a single large source such as the Anvil Hill Project in the context of NSW should be ignored in the environmental assessment process… That the impact from burning the coal will be experienced globally as well as in NSW, but in a way that is currently not able to be accurately measured, does not suggest that the link to causation of an environmental impact is insufficient. [98]
>
> While the Director-General argued that the use of the coal as fuel occurred only through voluntary, independent human action, that alone does not break the necessary link to impacts arising from this activity given that the impact is climate change/global warming to which this contributes.[97]

Following this decision, in December 2006, the NSW Planning Minister issued a statement requiring that, in all development, climate change must be considered. The NSW Department of Planning is in the process of preparing ministerial directions to guide NSW Councils in this task.[3]

The impact of the Gray decision is as yet uncertain. A 2007 case in Queensland, *Queensland Conservation Council (QCC) v Xstrata,*[4] seems not to have followed the logic of the decision in Gray's case. On the contrary, in this case, in which the QCC contested an application to extend an existing coal mine, Koppenol P, determined there was insufficient evidence to demonstrate any discernible harm arising from this particular mine's impact on greenhouse gas emissions [21]. An appeal on that decision may be lodged.[5] Clearly, the law in this area is in a state of flux. The decision in *Gray v Minister for Planning* aside, local governments may not yet be legally obliged to consider the indirect impacts on climate change of their development decisions. Nevertheless, that position may change at any time and the decision in *Gray's* case suggests the change is already occurring.

Local government actions and decisions affected by climate change

In addition to making decisions that may contribute to greenhouse gas emissions, local governments are responsible for many decisions, policies and programs that may be affected by the impacts of climate change. In this respect, the relevant risk for local governments is that, if they unreasonably fail to take into account the likely effects of climate change, their actions - or inactions - may cause or contribute to harm against individuals or the property of individuals. The issue here will be – have local governments, in their licensing, authorising and emergency procedures, adequately taken into account our growing vulnerability to the increasingly certain impacts of climate change? If they have not, individuals affected by their decisions – that is by their failure to take into account reasonably foreseeable climate change impacts – may eventually seek redress against them.

How might climate change impacts affect local governments' liabilities?

[3] Email communication, 22/01/07.
[4] *Re Xstrata Coal Queensland Pty Ltd & Ors* [2007] QLRT 33.
[5] Email communication from the EDO, 15/02/07.

Typical of recent predictions about the effects of climate change are those reported in a recent Discussion Paper, *Climate Smart Adaptation: What Does Climate Change Mean for You?*, produced by the Queensland government (Table 1)

Of all the anticipated climate change impacts, those that may affect local governments most directly (or which are most likely to lead to individual law suits against them) are:

- Sea level rise
- Flooding
- Extreme weather events

More obscure or discrete lawsuits could arise from the impacts of:

- Temperature rise
- Increased risk of vector-borne diseases

It's not hard to envisage the type of law suits that may eventuate or increase in incidence. These may challenge:

- The appropriateness of development approvals in flood prone, coastal zone or at risk areas
- The adequacy of building standards to withstand extreme weather events - as their area of activity expands and their frequency increases
- Responsibility for erosion, land slides etc, resulting from extreme weather events
- The adequacy of emergency procedures when more frequently put to the test
- Failure to undertake disease prevention programmes
- Failure to preserve 'public' natural assets in the face of climate change – if and when the technology becomes available etc, etc

So, how exposed are local governments to lawsuits in these areas and how "at risk" are they? Under what principles of law may local governments be held liable – and how successfully?

Table 1: Climate Change Uncertainties

There is more confidence in temperature projections than rainfall projections because there is a direct relationship between greenhouse gas concentrations and temperatures.

Very high confidence
Higher temperatures and changes in extreme temperatures
Global sea-level rise
Declining soil moisture

High confidence
Direction of rainfall change (decreasing)
Increased potential evaporation (actual depends on may factors)
Increasing storm surge heights and the risk along the east coast of Queensland
Increasing cyclone intensity
Increasing temperatures at the regional scale, including extremes

Medium to high confidence Increased risk of bushfire Increased incidence of extreme rainfall *Moderate confidence* Overall amount of rainfall decline and seasonality of that change Changes in average stream flow Increased drought *Low confidence* Abrupt or irreversible changes such as melting of polar ice sheets and changes in global ocean currents

Source: Climate Smart Adaptation: What Does Climate Change Mean for You? 2005 A Discussion Paper prepared by the DNMR for the Queensland Government, p.7.

Potential legal liabilities

Areas of potential legal liability for local governments include:

- Private nuisance
- Public nuisance
- Negligence

The relevant legal principles, as they may affect local governments, are summarised below.

Private nuisance: key ingredients

A nuisance is an "unlawful interference with a person's use or enjoyment of land, or some right over, or in connection with it" (*Hargrave v Goldman* (1963) 110 CLR 40). It is an indirect interference with a person's land or reasonable enjoyment of it (a trespass is a direct, intentional interference with land or property).[6] Not every interference with the use of land is unlawful – the courts recognise the need to balance between competing uses of land – that is, between the right of an occupier to do what he likes with his own land and the right of his neighbour not to be interfered with: "A useful test is perhaps what is reasonable according to the ordinary usages of mankind living in society, or more correctly in a particular society." (*Sedleigh-Denfield v O'Callaghan* (1940) AC 880).

Normally the suit is between landowners or occupiers of land but a claim in nuisance may also lie against people or authorities vested with management and control of a premises or asset. For instance, in *Halsey v Esso Petroleum Co Ltd* [1961] 2 All ER 145, the use of heavy trucks outside the defendant's premises created a private nuisance for a neighbour. In some circumstances, a person may be liable in private nuisance, even though the damage results from natural causes, for example, a natural weakening process which the defendant knew of but did nothing to prevent (*Leakey v National Trust* [1980] QB 485).[7]

[6] McGlone,F & Stickley,A, *Australian Torts Law*, 2005, LexisNexis / Butterworths, p.426.
[7] See further, McGlone & Stickley, n.3, p.430.

The essential ingredients of a claim in nuisance are:

- A person or authority is vested with management and control of the premises or asset, and
- The consequence of the interference is 'sensible' or 'material injury' to property or the reasonable enjoyment of it; and
- The interference complained of must have arisen as a result of the respondent's actions or inactions.
- Knowledge or foresight of the risk of harm exists.

Other points to note are:

- If the nuisance would have arisen anyway you cannot be liable. The respondent must be shown to have been responsible for the nuisance or a significant extension of it.

- Nowadays, a claim in nuisance may lie for acts of nonfeasance (i.e. failure to prevent a nuisance occurring) as well as misfeasance (actively creating a nuisance). In *Goldman v Hargrave* (1963) 110 CLR, the defendant was liable for the failure to extinguish a fire in a tree when the fire was caused by lightning and later spread to neighbouring property. In finding the defendant liable, the court took into account the defendant's knowledge, skill and resources.

- If the claim is one of misfeasance – that is, improper performance of a positive act – then a degree of fault is now usually required (*Burnie Port Authority v General Foods Pty Ltd* (1994) 179 CLR 520). For instance, the consequence of the action must be reasonably foreseeable (*Cambridge Water Co v Eastern Counties Leather Plc* [1994] 2 AC 264). However, for a nuisance caused by direct physical injury to a neighbour's land, strict liability (that is, liability despite the absence of any fault) may still apply at common law.[8]

- The requirement of fault in cases based on misfeasance provides scope for statutory defences such as those under the *Civil Liability Act (Qld) 2003* (CLA) (discussed below).

- Despite the above, it is not necessary in a case of nuisance to prove the defendant was under a duty to take care (c.f. claims in negligence, discussed below).

- Nuisance claims relate to actual damage to property.[9]

Public nuisance and local government

[8] As opposed to nuisance by encroachment on a neighbour's land and nuisance by interference with a neighbour's quiet enjoyment of the land.
[9] See further, McGlone & Stickley, n.3, pp.426-436; Bates,G, *Environmental Law in Australia*, 2006, LexisNexis/Butterworths, pp.171-172.

A public nuisance is a nuisance that materially affects the comfort and convenience of a class of people that may be described as a section of the public.[10] The interference must be both substantial and unreasonable since the doctrine of give and take applies to public nuisance as much as private nuisance.[11] Those potentially liable are the persons who created it and also *persons who unreasonably failed to end it*. The main additional ingredient to note is that anyone who is affected may complain regardless of any property interests, provided they have suffered some special damage (or have a special interest in the matter). Remedies for all types of nuisance include abatement, injunction and damages.[12]

What type of activities might expose local governments to claims based on nuisance?

Activities that cause an unreasonable interference with another person's land by way of – landslides, bush fires, flooding, coastal erosion etc - could give rise to claims in nuisance against a local government if that local government was 'in control' of the premises (or resources) from which the nuisance emanated - either as the landowner /principal manager or, for instance, during emergency operations.[13] Of course, local governments could be liable in nuisance for failing to deal with the impacts of any of these activities regardless of any climate change, provided they were reasonably foreseeable. However, what climate change brings into the equation is a rapidly evolving test of what is 'reasonably foreseeable'.

Negligence

The tort of negligence provides a remedy for a person's failure to take care not to injure someone else. It provides a remedy for damage to the person (whereas nuisance provides a remedy for damage to property). In negligence cases the courts impose liability for actual damage caused if –

- A reasonable person in the defendant's position could have avoided the damage by exercising reasonable care; and
- The defendant was in such a relationship to the plaintiff that he or she ought to have acted with that degree of reasonable care.

Put simply, an action in negligence lies when:

- A duty of reasonable care was owed to the plaintiff.
- That reasonable standard of care was not followed.
- Personal or economic harm or loss occurred as a result of the defendant's failure to exercise that reasonable standard of care.[14]

The relevant questions to ask are:

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[10] *Wallace v Powell* [2000] NSWSC 406 at [32].
[11] McGlone & Stickley, n.3, p.440.
[12] See further, McGlone & Stickley, n.3, pp.440-443; Bates, n.6, pp.174-179.
[13] Actions in nuisance would not normally lie against a licensing authority acting only in that capacity; a negligence suit (based on a duty of care) is likely to be more appropriate.
[14] See further, McGlone & Stickley, n.3, pp.103-110.

- Was a duty of care owed?
- If yes, what was the applicable standard involved in the duty of care? And
- Did the harm or loss occur as a result of that failure to adopt the standard of care?

The first two questions relate to the standard of care, the third relates to questions of causation and remoteness. With respect to negligence, it is also pertinent to note that:

- Any "salient factors" may be considered in order to determine the *existence* of a duty of care in a particular case (*Perre v Apand* (1999) 198 CLR 180; *Sullivan v Moody* (2001) 207 CLR 562). These include – vulnerability, power, control, generality or particularity of the class, the resources of and demands upon the authority etc.
- The *standard* of care expected is one which is reasonable in the circumstances. Failure to take action or supply information may ground liability in negligence.
- Industry practice will be relevant but not conclusive (F v R (1983) 33 SASR 189). General practice itself may be shown to be negligent (*Thompson v Smiths Ship Repairers (North Shields) Ltd* [1984] 1 All ER 881).
- It does not matter that the *particular* harm which eventuates, or precise set of circumstances leading to the harm was not foreseeable.
- In some cases, *assumption of control* could be a crucial issue.[15]

How does all this relate to the work of local governments? Two cases help to illustrate some of the issues. In the first case, *Graham Barclay Oysters P/L v Ryan* (2002) 125 LGERA 1, the respondent, Mr Ryan had consumed some contaminated oysters grown in Wallis Lake, near Forster in New South Wales. He subsequently contracted Hepatitis A virus (HAV). Mr Ryan sued the growers, the distributors, the Great Lakes Council and the State government. Against the Council, he claimed it had failed to introduce more stringent policies and practices to prevent pollution of the lake. For instance, in May 1996, it had decided not to respond to complaints about malfunctioning septic tanks around the foreshores of the lake. The court of first instance held the Council, the State and the Barclay companies were all liable in negligence. Eventually, on appeal to the High Court of Australia, the claims against the Council and the State were overturned: they were not liable. Why? Considering the three essential limbs of a claim in negligence, the High Court held:

1) Establishing a duty of care

i) Exercise of a political power is non-justiciable: In the case of a governmental authority, the High Court argued there may be a very large step from foreseeability of harm to the imposition of a legal duty to take steps to prevent the occurrence of that harm (para [9]). "Setting priorities by government for the raising of revenue and the allocation of resources is essentially a political matter, and if the reasonableness of such priorities is a justiciable issue, that can be so only within limits." (Gleeson CJ, para [7]).

ii) There was no assumption of control: The Court argued the conferral on a local authority of statutory powers in respect of activities occurring within its boundaries does not in itself

[15] See further, McGlone & Stickley, n.3, pp.111-134; Bates, n.6, pp.179-190.

establish in that authority control over all risks of harm that may eventuate from the conduct therein of independent commercial enterprises (para [154]). Something more is required to establish a duty of care:

> The Council has not been given, by virtue of its statutory powers, such a *significant and special measure of control* over the risk of danger that ultimately injured the oyster consumers so as to impose upon it a duty of care the breach of which may sound in damages at the suit of any one or more of those consumers. (para [154]).

2) If there was a duty of care, what would that duty of care entail?

The problem for the respondent here was that the risk of contamination could never have been entirely eliminated and nor was it possible to point to any specific act or omission that would have prevented harm to Mr Ryan.

3) Remoteness/causation: Did the harm result from the failure to adopt an applicable standard of care?

Even if a duty of care could be established, the High Court held the Council's powers to control the situation were too remote from the cause of harm to Mr Ryan. There were simply too many intervening levels of decision-making between the conduct of the Council and the harm suffered by consumers.

The outcome of the decision in *Graham Barclay Oysters P/L v Ryan* is that local governments will only become liable for harm to individuals if they have assumed a significant and special measure of control over the risk of danger:

> It will ordinarily be necessary to consider the *degree and nature of control* exercised by the authority over the risk of harm that eventuated; the *degree of vulnerability* of those who depend on the proper exercise by the authority of its powers; and the consistency or otherwise of the asserted duty of care with the *terms, scope and purpose of the relevant statute* (para [149]).

An example of a case where a special and significant measure of control was found to exist is *Brodie v Singleton Shire Council* (2001) 206 CLR 512. This case is also noteworthy because the earlier distinction between acts of non-feasance (for which no liability could lie) and acts of misfeasance (creating potential liability) was over turned.

The central issue in *Brodie's* case was whether a local authority should be held liable for a failure to maintain a highway (that is, for non-feasance not just mis-feasance). The High Court held that, in this instance, highway authorities have *physical control* over the object or structure which is the source of the risk of harm and, as such, they have such a *significant and special measure of control* over the safety of the person or property of citizens as to impose upon them a duty of care:

> Whatever may be the general significance today in tort law of the distinction between misfeasance and non-feasance, it has become more clearly understood that, on occasions, the powers vested by statute in a public authority may give it such a *significant and special measure of control* over the safety of the person or property of citizens as to impose upon the authority a duty of care This may oblige the particular authority to exercise those powers to avert a danger to safety or to bring the danger to

> the knowledge of citizens otherwise at hazard from the danger. In this regard, the factor of *control* is of fundamental importance (at [163]).

The High Court also held that financial considerations and budgetary imperatives may fall for consideration when determining what should have been done to discharge a duty of care (at [164]). In a direct response to this decision, section 37 of the *Civil Liability Act*, Qld, 2003, has now excluded local governments' liability for acts of non-feasance except when an authority has actual knowledge of the particular risk that caused the harm.

In thinking about the relevance of these cases to the work of local government and climate change impacts, the message seems to be that - a duty of care may be established against a local government if that local government has adopted a significant and special measure of control over the activity or property giving rise to a dispute. Unfortunately, there are many areas in which local governments appear to be operating with just such measure of control – approving development applications; controlling foreshores, managing public land, conducting emergency relief operations etc. etc. However, fortunately for local governments, there are several defences and exceptions that will help to reduce local governments' exposure to law suits based in negligence (and sometimes nuisance too).

Local government defences to claims in nuisance or negligence:

The principal defences to claims in negligence are:

No assumption of control: A council that does not have a *significant and special measure of control* over a risk of danger, will not be liable in negligence. Issues such as the remoteness of the risk; vulnerability of the claimant; scope of the statute, political discretion etc will all be taken into account, as occurred in Ryan's case.

Blindingly obvious actions: Managers (mostly of public land) are generally entitled to assume the public will take reasonable care for their own safety so that an obvious danger (or risk) will reduce the burden on the defendant to show reasonable care was taken to prevent the danger occurring. (*Romeo v Conservation Commission of the Northern Territory* (1998) 96 LGERA 410)

Defence of statutory authority: Parliaments have shown willingness to exempt statutory authorities from negligence provided they were acting in good faith in the pursuit of their statutory responsibilities. However, statutory exemptions will generally be construed narrowly as common law rights should only be affected by clear or necessary and unambiguous statutory intent. For instance, in *Puntoriero v Water Administration Ministerial Corp* (1999) 104 LGERA 419 at 151, potato farmers had their crops destroyed after a water authority used chemicals in irrigation water to tackle an infestation of blue-green algae. Although statute exempted the authority from any loss or damage "suffered as a consequence of the exercise of a function", the failure to warn the farmers of the danger created a separate tortious action.[16]

[16] See further, Bates, n.6, pp.183-185.

If an environmental nuisance is the "inevitable result" of activities expressly authorised by statute, the defence of statutory authority may apply (*Allen Gulf Oil Refining Ltd* [1981] AC 1001). Harm may be regarded as inevitable if the work causing the harm was reasonably necessary, properly performed and there was no reasonable way of avoiding the harm (*Symons Nominees Pty Ltd v Road and \Traffic Authority of NSW* [1991] Aus Torts Rep 68, 675). However, environmental legislation, including the *Environmental Protection Act, 2004* (Qld) (EPA), generally preserves common law remedies so environmental licensees are not exempt from liability simply because they have statutory authority to operate under the EPA.[17]

Civil Liability Act 2003, Qld (CLA): This Act provides the most sweeping defence for local governments. It applies to the wrongful exercise of - or failure to exercise - a function of a public authority including local governments. It provides that an act or omission of the authority does not constitute a wrongful exercise or failure unless the act or omission was in the circumstances *so unreasonable that no public or other authority having the functions of the authority in question could properly consider the act or omission to be a reasonable exercise of its functions.*[18] Other principles of relevance are stated in section 35:

- An authority's functions are limited by financial and other resources
- The general allocation of resources is not open to challenge
- Functions required to be exercised should be decided by reference to the broad range of its activities
- The authority may rely on evidence of its compliance with its general procedures and any applicable standards as evidence of the proper exercise of its functions.

For the time being it appears the *Civil Liability Act* has cut short local governments' exposure to claims in negligence unless their actions or inactions are so unreasonable that no other authority would consider those acts or omissions to be reasonable – a sort of lowest common denominator threshold.[19] This legislation offers a degree of comfort and security for local governments. The main outstanding risk for local governments is that, with respect to climate change, the range of actions – or inactions – that may amount to a *wholly unreasonable response* is likely to expand rapidly in the next few years as more information about the impacts of climate change becomes readily available.

Climate change litigation risks: What can and should local governments be doing to protect themselves?

In the light of the CLA, what should local governments be doing to make sure they are not acting *wholly unreasonably* in their failure to take into account climate change impacts? Some of the actions local governments may wish to consider are:

[17] EPA, Qld, s.24. See further, Bates, n.6, p.179.
[18] CLA, Qld, 2003, s.36(2).
[19] For comparable legislation in other Australian states, see, *Civil Law Wrongs Act* 2002 (ACT) s.110; *Civil Liability Act* 2002 (NSW) s.42; *Civil Liability Act* 2002 (Tas) s.38; *Wrongs Act* 1958 (Vic) s.83; *Civil Liability Act* 2002 (WA) s.5W. See further, McGlone & Stickley, n.3, pp.184-188.

Take into account relevant documents, policies, guidelines and expert advice so far as possible:

There is already a host of information, recommendations and guidelines in circulation that local governments can, and ideally should, be following. By keeping abreast of these reports and applying them as best they can given their resource constraints, local governments will protect themselves from claims of unreasonableness. They are in a good position to raise the defence in s.35 of the CLA – that their actions complied with general procedures and any applicable standards. Some pertinent examples of relevant reports and policies operating in Queensland are:

- **State Planning Policies (SPPs):** In particular, the *State Coastal Management Plan* and State Planning Policy no. 1/03 on *Mitigating the Adverse Impacts of Flood, Bush Fire and Landslide* provide valuable guidance on strategies for dealing with climate change.
- **Referral Agencies' Advice:** Getting as much help as possible from State agencies seems like a good strategy for spreading the risk of liability. Will local governments be liable if they do *not* follow the advice that comes from such agencies? Not necessarily, see below for a view that they will not be.
- **Climate change strategies:** These include – the National Greenhouse Strategy (1998); the Queensland Greenhouse Strategy (2004); and the forthcoming Council of Australian Governments policy on climate change.
- **Cities for Climate Change Program:** Local governments could try to rely on their participation in this program, or others like it, to demonstrate they are tackling climate change seriously and responsibly. However, much of the program seems to involve preventive measures to reduce emissions, rather than risk analysis and policy development. The latter is necessary to identify and deal with areas of potential legal liability.

Are local governments obliged to follow all these recommendations and to implement them all? Obviously that will depend on the legal status of each type of document or advice. However, in general, for all non-binding documents, the rule of thumb is that they should be weighed up sensibly and balanced against any other legitimate concerns of local government. The sort of leeway local governments are allowed is well demonstrated by the case of *Mackay Conservation Group Inc v Mackay City Council & Anor* (2005). This case involved a preliminary approval for a major, integrated tourist development at East Point, Mackay (on a low lying sand spit). The Department of Natural Resources and Mines had recommended suitable precautions against inundation. Protection in case of 1:500 year events was one of the Department's recommendations. However, Council decided not to follow the recommendation because "Designing the whole site for ultimate events is impractical" (citing the interim planning report, at [62]). On appeal, the Planning and Environment Court (PEC) approved that line of reasoning, citing with approval dicta in *Daikyo (North Queensland Pty Ltd) v Cairns City Council and Anors* [2003] QPEC 022:

> The prevailing philosophy, based on sound common sense, is to balance risk and economics. The Council has undertaken that balancing exercise in setting the standard reproduced in this condition (as well as others). The Court is not the planning authority and it is not the Court's responsibility to set the standard: see *Grosser v Gold Coast City Council* (2001) 117LGERA 153 at para [38] and *Telstra Corporation Ltd v Pine Rivers Shire Council* [2001] QPELR 350 at paras [117]-[120]. (Daikyo, at [22]).

Adopt integrated risk management

As the above decision demonstrates, the requirement upon local governments is to weigh up the issues and make a balanced decision. For the time being local governments are justified in dealing with this indirectly eg. through their consideration of relevant State Planning Policies. This is consistent with the strategy of "mainstreaming" climate change concerns. However, these measures are best considered as part of an overall, integrated risk management strategy in which local governments review their actions as broadly as possible and monitor new developments and guidelines as they arise.

Don't overdo it!

Local governments are entitled to balance climate change issues against competing considerations. Remember:

- Limits on resources constrain decision-making and this will be taken into account in settling liability issues.
- Conditions in development approvals must be reasonable and relevant.

While ultimately local governments should be striving for best practice according to their means, the law, as it currently stands, may actually prevent them from becoming too ambitious. For instance, in *Daikyo (North Queensland Pty Ltd) v Cairns City Council and Anors* [2003] QPEC 022, an independent submitter, Dr Nott, argued in favour of a higher standard of protection against storm tide and marine inundation than was imposed by Cairns City Council on an application for residential and tourist development at Palm Cove. Skoien SJDC argued:

> (Section) 3.5.30 of IPA requires that a condition be relevant to but not an unreasonable imposition on the development or use of premises as a consequence of the development, or be reasonably required in respect of the development or use of premises as a consequence of the development. The imposition of Dr Nott's preferred marine inundation level sets the bar far higher than has been set for other comparable developments. So it would be an unreasonable imposition on this development, and is not reasonably required by this development. It requires this development to be immune from cyclonic wave effects to an extent that other development is not required to be. (para [27])[20]

In the light of this reasoning, local governments wishing to exceed the common law standard of what is a "reasonable and relevant" condition should include provisions to that effect in their planning schemes - perhaps with reference to the objectives of the *Integrated Planning Act, 2007* (Qld) and to ecologically sustainable development.

Be vigilant!

The main problem for local governments in this area is the rate of change. Climate change concerns are gathering momentum and this makes keeping up with the standard of what is reasonable care (or not wholly unreasonable) an ongoing task. As the contrasting decisions in *Xstrata* and *Gray* (discussed above) demonstrate, the law is in a state of flux. Perhaps the

[20] For a similar line of reasoning in a New Zealand case, see *EDS v Auckland Regional Council and Contact Energy*, A183/2002.

best that can be said is that the issues are evolving and the speed of change is increasing. As the *Climate Smart Adaptation Report* (July 2006) states:

> Since the release of the Strategy (Queensland Greenhouse Strategy 2004) there has been a growing international consensus on the scientific basis of climate change, combined with an enhanced appreciation that climate change will have direct and indirect environmental, social and economic impacts. The question that communities world-wide now need to consider has moved from 'should we adapt to climate change?" to "how, when, where and how fast should we adapt to climate change?" (*Climate Smart Adaptation*, at p.4)

Conclusions

This paper has examined some potential legal liabilities of local governments when making decisions about matters *affecting* climate change as well as matters *affected* by climate change. Local governments currently have available to them a number of defences that seem likely to protect them from claims based on a failure to recognize and respond to information about climate change. Nevertheless, just as the science of climate change is gathering momentum, so too the law in this area is evolving rapidly. Local governments should therefore take care to ensure their actions, decisions and policy responses to matters that may either contribute to, or be affected by, climate change remain current and reasonable in what is a rapidly evolving policy context.