

About the EDO

- Community legal centre specialising in public interest environmental law.
- Mission: To empower the community to protect the environment through law.
- Functions:
 - Legal Advice and Representation;
 - Scientific Assessment and Advice;
 - Policy and Law Reform; and
 - Community Legal Education

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Overview

- Recent decisions on climate change “adaptation cases”
 - Sandon Point- Walker v Minister for Planning
 - Gippsland Coastal Board v South Gippsland SC
 - Northcape Properties
 - Charles & Howard v Redland Shire Council
- What relevant legislation and policies exist on climate change?
- Are Council's liable for climate change?

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Primary Impacts of Sea-level Rise

- a) Increased Storm Surges and Coastal Flooding
- b) Increased Coastal Erosion
- c) Inundation of Coastal Wetlands and Lowlands
- d) Increased Salt Water Intrusion into Aquifers
- e) Potential Health Impacts

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Cases on Climate Change and Sea Level Rise

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Walker v Minister for Planning

- Application under Part 3A for approval of a concept plan for residential subdivision and a retirement development at Sandon Point, Thirroul.
- Judicial review – challenge to the legality of the Minister's decision by Jill Walker
- Minister's decision to approve concept plan declared to be invalid by the Land and Environment Court because the Minister failed to consider ecologically sustainable development (climate change flood risk) when assessing the concept plan

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Walker v Minister for Planning (continued)

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

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Gippsland Coastal Board v South Gippsland SC & Ors

- Recent decision of the Victorian Civil and Administrative Tribunal
- Found that land unsuitable for development for number of planning reasons including climate change risks
- Objection to development were:
 - Unnecessary and unacceptable risk to coastal environment
 - Inappropriate in terms of climate change studies undertaken by Board.

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Gippsland Coastal Board v South Gippsland SC & Ors (cont.)

- Found that required to consider significant effects on the environment (s60(1)(e)) of *Planning and Environment Act 1987* including climate change
- Mentioned CSIRO studies suggest impact will include sea level risk and risks of coastal inundation
- Risk of long term intergenerational liability should be avoided. Sea wall proposed gave VCAT no comfort that protect land from sea level rises and storm events
- VCAT applied precautionary principle to refuse due to unacceptable risks together with planning reasons

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Northcape Properties Pty Ltd v District Council of Yorke Peninsula

- Supreme Court of South Australia upheld Council's decision to refuse development on the basis of unacceptable climate change risks to subdivision
- Relevant Local Plan had strong coastal and hazard protection requirements
- In particular required an assessment of the sea level predictions and impacts over the next 100 years due to climate change
- Expert evidence indicated coast would move 35-40 metres inland

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Northcape Properties Pty Ltd v District Council of Yorke Peninsula

- "This proposal offends so many of the goals and objectives of the Development Plan that development consent must be refused. The proposal is on any view an attempt to develop the land to the greatest extent possible without due regard to the ecological sensitivity of the area and the need to preserve natural features."

Northcape Properties Pty Ltd v District Council of Yorke Peninsula [2008] SASC 57 at [28].

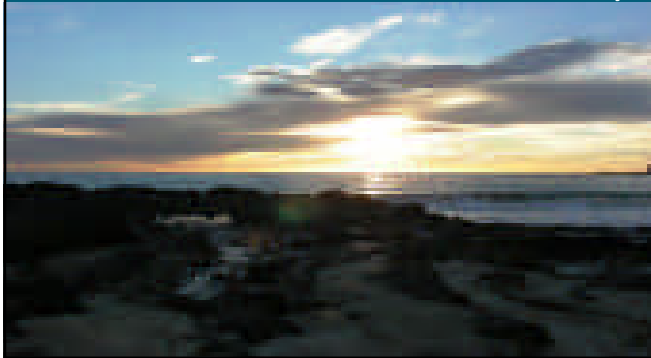
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Charles & Howard v Redland Shire Council [2007] QCA 200

- The Queensland Court of Appeal upheld a condition that made the Applicant move house site to avoid excessive fill
- The CA considered climate change impacts and said it was appropriate to impose conditions to address the flood risk

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Laws, Policies and Council Liability



Key findings of Project with Sydney Coastal Councils

- Very few instruments in NSW even mention climate change. Those that do place few obligations on councils.
- 16 instruments out of 137 contained terms of interest:
 - 3 Commonwealth Acts
 - 4 NSW Acts
 - 9 Coastal LEPs
- 20 NSW Government policies include sections on climate change

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Councils must consider climate change

- Even if the Local Environmental Plan has no mention of climate change, Councils still must consider it
- Implicit under s79C(1) that Council's must consider impacts on the environment
- Courts clearly found that ESD requires consideration of climate change impacts
- SEPP 71 requires also to assess the coastal processes and coastal hazards
- Coastal Policy exists but not always binding

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Common law liability

- Tort of negligence and nuisance most relevant to climate change
- Councils are likely to owe a duty of care in assessing DAs in coastal zone
- To discharge its duties of care, a council should adopt a clear climate change management plan, building standards, set back policies, mandatory precautionary conditions and prohibited development zones

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Local Gov't Act 1993- Section 733(b)

- Exempts local councils from liability for advice, actions or omissions relating to natural hazards in coastal zone.
- Covers granting of development assessment, making of LEPs, flood mitigation works.
- Applies even where council is 'negligent' but -
- Only applies where council has acted in 'good faith' - acting in accordance with Coastal Management Manual 1990

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Civil Liability Act 2002

- Introduces new test for establishing whether Council has breached its duty of care - only applies to negligence
- Councils bear no liability for obvious risks
- Council is only liable if it has acted 'so unreasonably'. Without clear policies and procedures this argument could be made out in relation to climate change.

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Conclusions

- Councils are going to be increasingly at risk of climate change litigation
- Need to consider the climate change risks in developing new Local Environment Plans, particularly by providing clear assessment frameworks, policies and procedures for climate change
- Careful consideration of climate change impacts will be required in assessing DAs to avoid litigation