
Heating up: Climate change law and the evolving responsibilities of local government

Philippa England

The Intergovernmental Panel on Climate Change, in its Fourth Report, has now stated, with very high confidence (at least 90% certainty), that global warming is occurring, and it is highly confident (about 80% or more certain) that the reasons for global warming include human-generated, greenhouse gas emissions. Given this unequivocal recognition of global warming, the question that decision-makers must now ask themselves, is "what should we be doing about it?" Obviously there is a political debate to be had on this question but there is also an emerging body of climate change law that decision-makers, at all levels of government, need to be aware of when they debate and determine their response to this question. This article discusses the current state of climate change law as it applies to decision-makers in local government. This discussion relates both to the recognition and mitigation (or reduction) of greenhouse gas emissions and to the need for adaptation to climate change impacts. In all these respects, the emergent law seems to require that local governments act sooner rather than later to develop a reasonable response to climate change considerations. Consequently, this article considers what the main elements of a reasonable response to climate change considerations might be. The aim here is to assist local governments in developing timely, appropriate and legally robust measures to deal with climate change considerations.

INTRODUCTION

At least since the Fourth Report of the Intergovernmental Panel on Climate Change (IPCC), it seems unequivocal that climate change is occurring,¹ and at least highly likely that human induced emissions of greenhouse gases are contributing to that change.² Information about the consequences of climate change is also becoming more reliable. The anticipated consequences include: sea level rise; more frequent and more extensive extreme weather events; more frequent and more prolonged droughts; increases in vector borne diseases, and; massive loss of biodiversity (including the wholesale destruction of the Great Barrier Reef).³ The IPCC Fourth Assessment Report models various scenarios for reducing greenhouse emissions and minimising the impacts of climate change. These predict that, if global greenhouse gas emissions (taking into account the impact of aerosols) reach 445-490 parts per million (ppm), a global average temperature increase of 2.0-2.4°C will occur. To stay within the 445-490 ppm limit, substantial greenhouse gas abatement is necessary. This means a reduction of at least 50% on year 2000 greenhouse gas emissions by the year 2050.⁴ In the light of this accumulated evidence, and the highly authoritative nature of the Fourth IPCC Report, decision-makers are now asking themselves (and their communities) what we should be doing about it and how should we be doing it.

¹ Intergovernmental Panel on Climate Change, Fourth Assessment Report, *Climate Change 2007: The Synthesis Report* (AR4 SYR Summary for Policymakers), available at http://www.ipcc.ch/pdf/assessment-report/ar4/syr/ar4_syr_spm.pdf (viewed 5 December 2007), p 1.

² Intergovernmental Panel on Climate Change, n 1, p 3.

³ Intergovernmental Panel on Climate Change, n 1 pp 9-11.

⁴ Intergovernmental Panel on Climate Change, n 1 p 21.

To date, local governments have been at the forefront of measures to reduce greenhouse gas emissions and to adapt to climate change.⁵ This article reviews some recent developments in climate change case law and the implications of those developments for local governments in Australia. It argues that, although local governments may not be first on the hit list for potential litigants, the threat of litigation is becoming increasingly more real. In view of this, the only sensible strategy for local governments is to start incorporating climate change considerations into a wide range of their decisions and activities. In so doing, they should aim to develop a *reasonable* and well-documented response to climate change considerations. The final part of this article suggests some strategies that may assist local governments in answering the question: what is a reasonable response by local governments to the emerging predictions of climate change and what are the sorts of actions, policies and decisions that need to be implemented right now?

CLIMATE CHANGE LITIGATION: HOW REAL IS THE RISK?

From a legal perspective, decisions of local government may come under review from two angles. 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) 152 LGERA 258; [2006] NSWLEC 720 has opened the door for judicial review of decisions that fail to consider the effects of a development approval on greenhouse gas emissions. This aspect relates to the *mitigation* (or reduction) of greenhouse gas emissions. Secondly, local governments may be held to account 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. This aspect relates to the need for *adaptation* to climate change impacts. The recent decision in *Walker v Minister for Planning* [2007] NSWLEC 741 indicates the law is now moving rapidly with respect to climate change adaptation as well as mitigation activities.

Both these types of liability are discussed below. The general conclusion is that recent case law demonstrates the only sensible long term strategy for local governments is to develop a *reasonable response* to climate change, including measures that:

- assess greenhouse gas emissions;
- consider how to reduce them; and
- allow for adaptation to climate change impacts.

Mitigation (reduction) of greenhouse gas emissions

Over the past 10 years, courts in Australia and elsewhere have been reluctant to factor climate change arguments into their decision-making.⁶ Two lines of reasoning have prevailed. First, the science of climate change has been rejected. In some decisions, the scientific argument linking greenhouse gas emissions with global warming has been doubted wholesale,⁷ but even when the scientific arguments have been generally accepted, plaintiffs have struggled to satisfy the law's evidentiary requirements for causation – that is, that any particular source of greenhouse gas emissions is directly linked with damage suffered by the plaintiffs or by any particular resource or in any particular incident.⁸ Even if

⁵ See for instance, their involvement in the Cities for Climate Protection Program. Details available at <http://www.greenhouse.gov.au/local/ccp/index.html> (viewed 8 April 2008).

⁶ *Greenpeace Australia Ltd v Redbank Power Company Pty Ltd* (1995) 86 LGERA 143 at 153; *Wildlife Preservation Society of Queensland Proserpine/Whitsunday Branch Inc v Minister for Environment and Heritage* (2006) 93 ALD 84; 232 ALR 510; [2006] FCA 736; *Re Xstrata Coal Queensland Pty Ltd* [2007] QLRT 33; *Massachusetts v Environment Protection Agency* 541 US at 278 (2005) Vieth.

⁷ *Re Xstrata Coal Queensland Pty Ltd* [2007] QLRT 33.

⁸ *Wildlife Preservation Society of Queensland Proserpine/Whitsunday Branch Inc v Minister for Environment and Heritage* (2006) 93 ALD 84; 232 ALR 510; [2006] FCA 736; *Anvill Hill Project Watch Assn Inc v Minister for the Environment and Water Resources* (2007) 97 ALD 398; [2007] FCA 1480.

arguments about causation can be overcome, courts have often held the matter is non-justiciable, being a matter for those in politics and government to resolve without the intervention of the courts.⁹

The traditional reluctance of the courts is evidenced in an early case, *Greenpeace Australia Ltd v Redbank Power Co Pty Ltd* (1995) 86 LGERA 143. In this case, Greenpeace challenged Singleton Council's decision to grant development consent to a new power station at Wakworth in the Hunter Valley. Greenpeace argued that, given the development's anticipated contribution to greenhouse gas emissions, consent for the project should be refused. The appeal failed. In his decision, his Honour Pearlman CJ noted the absence of any legislative basis for prioritising climate change issues over and above any other concerns, such as the increasing demand for electricity:

There are as yet no specific directives or obligations cast upon individual operators in the energy field. This may come, as a result of the development of further response measures, but thus far the response to the enhanced greenhouse effect is in the realm of governmental policy.¹⁰

Although the existence or otherwise of a causal link between coal mining and climate change was not debated in full, the judge did note:

The application of the precautionary principle dictates that a cautious approach should be adopted in evaluating the various relevant factors in determining whether or not to grant consent; it does not require that the greenhouse issue should outweigh all other issues.¹¹

Twelve years later, these pillars of judicial reasoning look a lot less stable. Three cases serve to illustrate the point.

Gray v Minister for Planning

This case¹² marked an important breakthrough in Australian case law on greenhouse gas emissions. 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 for the project was inadequate.¹³ The proposed open-cut mine would 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 decision, her honour Pain J made the following comments:

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.¹⁴

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.¹⁵

In her reasoning, Pain J relied on the objectives of the relevant planning legislation which include promoting ecologically sustainable development (ESD), including intergenerational equity and the

⁹ See for instance statements in *Massachusetts v Environment Protection Agency* 541 US at 278 (2005) Vieth: "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."

¹⁰ *Greenpeace Australia Ltd v Redbank Power Co Pty Ltd* (1995) 86 LGERA 143 at 153.

¹¹ *Greenpeace Australia Ltd v Redbank Power Co Pty Ltd* (1995) 86 LGERA 143 at 154.

¹² *Gray v Minister for Planning* (2006) 152 LGERA 258; [2006] NSWLEC 720.

¹³ *Gray v Minister for Planning* (2006) 152 LGERA 258; [2006] NSWLEC 720 at [125]-[126].

¹⁴ *Gray v Minister for Planning* (2006) 152 LGERA 258; [2006] NSWLEC 720 at [98].

¹⁵ *Gray v Minister for Planning* (2006) 152 LGERA 258; [2006] NSWLEC 720 at [97].

precautionary principle.¹⁶ These overarching principles were the basis for her decision that the environmental impact report should have included information about the downstream impacts – that is, the contribution to global warming caused by the eventual burning of coal mined at Anvill Hill.¹⁷

Following the decision in *Gray*, the NSW Planning Minister issued a new State Environmental Planning Policy which requires that climate change impacts, including downstream impacts, must now be considered in development applications for mining, petroleum production and extractive industries.¹⁸

The overall impact of the decision in *Gray's case* is still unfolding. Whilst the reasoning is largely in line with an earlier Victorian case, *Australian Conservation Foundation v Minister for Planning* (2004) 22 VAR 82; 140 LGERA 100; [2004] VCAT 2029, a similar line of reasoning has not been applied in other recent cases involving the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) (EPBC Act).¹⁹ Furthermore, a second law suit challenging the Anvill Hill Project demonstrates the limited nature of the courts' jurisdiction notwithstanding the decision in *Gray's case*.

In *Anvill Hill Project Watch Assn Inc v Minister for the Environment and Water Resources* (2007) 97 ALD 398; [2007] FCA 1480 a community group was unsuccessful in its bid to challenge a decision of the Minister's delegate. The delegate, acting under the EPBC Act, had decided the Anvill Hill project was not a controlled action requiring an approval under the EPBC Act. In refusing the appeal, the court held itself bound to accept the view of the Minister's delegate that emissions from the proposed mine would not be a substantial cause of climate change affecting Pt 3 protected matters. The Court was bound by the particular terms of the Act and by the delegate's discretion duly exercised in accordance with the law.

Despite the decision in *Gray's case*, it appears neither decision-makers nor the Australian judiciary have a consistent stance on climate change issues. At best, it might be stated that:

- Evidence of the occurrence of global warming caused by anthropogenic emissions of greenhouse gases is now quite widely accepted in these fora.
- Major developments in extractive industries that impact on greenhouse gas emissions may – and most likely will – be required to provide an account of their direct and indirect contribution to greenhouse gas emissions.
- Where, as in the EPBC Act, the *specific terms* of the statute require evidence of a direct or substantial link between a particular activity and a climate change impact, general evidence of the impacts of climate change will seldom suffice to convince the courts (or decision-makers) that a causal connection has been made out. However, not all statutes require such a narrow interpretation (see further below).

Whilst, therefore, the jury may still be out in the Australian jurisdiction, it is worth noting some important recent developments in the United States.

Massachusetts v Environmental Protection Agency 549 US (2007)

In this very lengthy dispute, the American state of Massachusetts sued the US Environmental Protection Agency (EPA) for its failure to regulate greenhouse gas emissions from new cars. The plaintiff argued that in failing to do so the US EPA was in breach of the *Clean Air Act*.²⁰ That Act states:

The Administrator [the US EPA] shall by regulation prescribe and from time to time revise) in accordance with the provisions of this section, standards applicable to the emission of any air pollutant from any class or classes of new motor vehicles or new motor vehicle engines, which in his judgment

¹⁶ *Environmental Planning and Assessment Act 1979* (NSW), s 5(vii).

¹⁷ *Gray v Minister for Planning* (2006) 152 LGERA 258; [2006] NSWLEC 720 at [145].

¹⁸ State Environmental Planning Policy (Mining, Petroleum Production and Extractive Industries) 2007 (NSW), cl 14(2).

¹⁹ *Wildlife Preservation Society of Queensland Proserpine/Whitsunday Branch Inc v Minister for Environment and Heritage* (2006) 93 ALD 84; 232 ALR 510; [2006] FCA 736; *Re Xstrata Coal Queensland Pty Ltd* [2007] QLRT 33.

²⁰ *Massachusetts v Environmental Protection Agency* 549 US (2007) (No 05-1120) at 2-3.

cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare.²¹

By a majority of five to four, the US Supreme Court ruled the EPA has jurisdiction to regulate greenhouse gas emissions from new cars under the *Clean Air Act* and that it had failed in its duty to consider whether regulations should be made to regulate greenhouse gas emissions from new cars. Whilst the court could not require the US EPA to make such regulations, it could require it to consider whether such regulations are necessary and to form a reasoned opinion on the basis of scientific evidence as required by the Act.²²

There are some very important points to note in this case:

- The existence of a general, causal connection between man-made greenhouse emissions and climate change was not disputed. This is consistent with the majority of recent case law in Australia.²³
- The fact that the source of emissions (new cars in America) was, on its own, only a very small contributor to global greenhouse emissions did *not* preclude a court from finding there was a causal connection.²⁴ This departs from the reasoning in *Anvill Hill Project Watch Assn Inc v Minister for the Environment and Water Resources* and other cases decided under the EPBC Act.
- The fact that the action proposed (regulations for new cars) was only one small, incremental step that could not solve the problem outright or on its own was *not* a sufficient reason to refuse to take that action.²⁵ This reasoning is broadly consistent with that in *Gray v Minister for Planning* (per the decision whether to include indirect impacts in the EIA report).
- The terms “air pollutant” and “welfare” were broadly defined to include greenhouse gas emissions and climate change impacts.²⁶ Within Australia, it is likely that some generic terms within environmental legislation will also be interpreted broadly so as to best meet the purposes of the Act. Climate change issues, for instance, have been held to be a matter falling well within the ambit of ecologically sustainable development (ESD), including intergenerational equity.²⁷ However, as in the EPBC Act, some more specific terms may not be so broadly interpreted.

Clearly, a decision of the Supreme Court of America is not binding on Australian courts and decision-makers. Nevertheless, the case is an excellent example of how rapidly the law relating to climate change is evolving. Whilst in many respects it goes no further than *Gray's case* in its reasoning, it is important because the outcome, in a very high profile case, was made by a majority decision in the highest court of America. There is simply no way this decision could be regarded as an aberrant case or as an unusual or radical line of reasoning. In fact, the *Massachusetts case* is now one of three recent US federal court decisions in which regulators have been required to consider climate change impacts when setting standards for polluting industries.²⁸ At least in the United States, it appears the older lines of reasoning that previously prevented climate change litigants from succeeding have now been discarded:

While Washington's politicians dither, the federal courts have become increasingly active in the debate over global warming, aggressively pushing the White House and Congress to regulate greenhouse gases or explain why they cannot. These rulings add the force of law to the demands for action from

²¹ *Clean Air Act* (US), s 202(a)(1).

²² *Massachusetts v Environmental Protection Agency* 549 US (2007) (No 05-1120) at 31.

²³ *Massachusetts v Environmental Protection Agency* 549 US (2007) (No 05-1120) at 20.

²⁴ *Massachusetts v Environmental Protection Agency* 549 US (2007) (No 05-1120) at 21.

²⁵ *Massachusetts v Environmental Protection Agency* 549 US (2007) (No 05-1120) at 21.

²⁶ *Massachusetts v Environmental Protection Agency* 549 US (2007) (No 05-1120) at 26.

²⁷ *Gray v Minister for Planning* (2006) 152 LGERA 258; [2006] NSWLEC 720 at [118]-[135]; *Walker v Minister for Planning* [2007] NSWLEC 741 at [166].

²⁸ “A Loud Legal Voice on Warming” *The New York Times* Editorial, 18 November 2007, accessed at http://www.nytimes.com/2007/11/18/opinion/18sun3.html?_r=5&oref=slogin&pagewanted=print on 18 November 2007.

scientists, a growing number of business leaders and many state governors ... [the] decision should help persuade all these players that the time for delay and denial is long past.²⁹

Within Australia, much of the legislation governing the work of local governments includes terms and responsibilities that are more conducive to the type of expansive reasoning evidenced in the *Massachusetts case* than to the narrow interpretation of terms applied to the EPBC Act. For instance, decision-making entities operating under the *Integrated Planning Act 1997* (Qld), are required to advance “ecological sustainability” by ensuring their decision-making processes:

- take account of the short and long term environmental effects of development;
- apply the precautionary principle; and
- seek to provide for equity between present and future generations.³⁰

Another pertinent example is the statutory liability of public sector entities (and others) for actions that may cause environmental harm. In Queensland’s *Environmental Protection Act 1994* for instance, environmental harm is defined in s 14 as:

- (1) [A]ny adverse effect, or potential adverse effect (whether temporary or permanent and of whatever magnitude, duration or frequency) on an environmental value and includes environmental nuisance.
- (2) Environmental harm may be caused by an activity –
 - (a) whether the harm is a direct or indirect result of the activity; or
 - (b) whether the harm results from the activity alone or from the combined effects of the activity and other activities or factors.

In Queensland, it is an offence to cause serious or material environmental harm or an environmental nuisance unless the act or omission causing the harm is authorised under an environmental protection policy, programme, licence or approval, etc.³¹ Any person, acting with leave of the Court, can petition the courts to restrain a person from committing an environmental offence.³² As the offence is criminal in nature, local governments are not protected by the *Civil Liability Act 2002* (Qld) which relates only to civil rights and liabilities (see below).³³

Clearly, the combination of more expansive judicial reasoning and the gradual erosion of the causation hurdle, as evidenced in some recent climate change litigation, has opened the door to new forms of litigation against public sector entities.

Brown v San Bernardino County, 2007

This is another American dispute. Although settled out of court, the dispute demonstrates, consistent with the Australian and American authorities discussed above, that climate change law is now capable of fixing liability on smaller players – that is, entities that on their own make only a small contribution to global warming – and without a direct link to any particular damage always being required.

In 2006, the Californian State government enacted the *Global Warming Solutions Act* (known as “AB 32”). This Act binds the State of California to reduce its greenhouse gas emissions to 1990 levels by 2020. It also makes climate change impacts a legally significant issue for the purposes of the *Californian Environmental Quality Act 1970* (CEQA). Following this enactment, in April 2007, the Californian Attorney-General, Jerry Brown, filed a law suit against San Bernadino County. San Bernadino County is one of the fastest growing counties in California, expecting an influx of more than 500,000 people by 2030. Despite submissions from the Attorney General, its new General Plan,

²⁹ *New York Times*, n 28.

³⁰ *Integrated Planning Act 1997* (Qld), s 1.2.3(1).

³¹ *Environmental Protection Act 1994* (Qld), s 436(1). On this point, case law has established that types of authorised harm will be limited to those explicitly authorised in the permit or approval: *Fletcher v May* [2001] QDC 81. The emission of greenhouse gases are not normally so covered. See further, Laird T, *Environmental Harm for Greenhouse Gas Emitting Activities: A Case Study of a Coal-Fired Power Station* LLB research essay, unpublished, 19 November 2007; McGrath C “Legal Liability for Climate Change in Queensland” (2007) *Queensland Environmental Practice Reporter*, p 34; Fisher D, “The Statutory Relevance of Greenhouse Gas Emissions in Environmental Regulation” (2007) 24 *EPLJ* 210.

³² *Environmental Protection Act 1994* (Qld), s 505.

³³ *Civil Liability Act 2002* (Qld), s 1(4).

released in March 2007, contained no analysis of the impact of the Plan on climate change and it failed to require any mitigation measures. The Attorney-General argued that, when revising its planning scheme, San Bernadino County had failed to adequately consider climate change impacts in accordance with the new law. The dispute was finally settled out of court in August 2007. As part of the settlement, San Bernadino County has agreed to inventory its historical, current and projected greenhouse gas emissions, to set a target for reducing its emissions and to develop measures to reduce its emissions. The county must adopt its Greenhouse Gas Reduction Plan within two and a half years.³⁴

Could a legal battle of this nature ever happen in Australia? Whilst it may seem unlikely, given our less litigious society, that law suits of this kind would ever be launched in Australia, recent case law has made such an action entirely feasible. The decisions in *Gray's case* and in the *Massachusetts case* confirm that a contribution to greenhouse gas emissions does not have to be significant on a world scale, precisely measurable or directly related to a demonstrable impact in order to be taken into account in a court of law. Furthermore, local authorities, in their planning and development activities, are not required to limit their business to considering only "significant impacts" on "protected matters". On the contrary, they are very often vested with much more sweeping objectives such as promoting ecologically sustainable development. There is really no scope, therefore, for abstaining from action on the basis of a limited jurisdiction or the narrow scope of their statutory powers.

Although we live in a less litigious society than the United States, the lack of national political leadership in recent years has sparked a spate of climate change litigation in Australian courts.³⁵ Will the same plaintiffs (or others) eventually turn their minds to suing local governments for actions or inactions that fail to account for, reduce and/or offset greenhouse gas emissions? If litigation against local governments were to happen, which local governments would be most at risk and on what grounds? At this point in time, two types of action against local governments are foreseeable. First, local governments that fall behind – or vigorously refuse to follow – the evolving practice of other councils in the same region, or sharing a similar character, could well find they are next on the list for plaintiffs seeking to "make a point". Secondly, and probably more likely, climate change considerations may increasingly be raised in NIMBY-type appeals on planning decisions. The re-zoning of land for more intensive forms of development, whether industrial or suburban, might be a case in point. Plaintiffs may simply add the increased production of greenhouse gas emissions to their list of considerations that should have been taken into account before a decision was made. The recent decision in *Walker v Minister for Planning* [2007] NSWLEC 741, discussed below, demonstrates the potential for this sort of litigation.

The arguments for taking action are rapidly accumulating. At the very least, a combined reading of *Gray's case* and the *Massachusetts* decision suggests that local governments should now be attempting to *recognise and assess* the climate change impacts of their decisions across a whole range of their activities. If they do not, their *processes* of decision-making may well be held to be incomplete or inadequate, having failed to take into account a relevant consideration.

Adaptation to climate change impacts

The case law reviewed above suggests that local governments are becoming increasingly vulnerable to litigation if they fail to take into account climate change considerations when making decisions that will impact upon greenhouse gas emissions. In order to avoid liability, local governments should be seen to be developing a reasonable response to climate change such that, across a range of their activities, contributions to greenhouse gas emissions are identified and methods of reducing or off-setting those emissions are considered. The next question is: will local governments be held liable if they fail to take into account the *consequences* of climate change in their decision-making and other activities? That is, to what extent will local governments be held liable if they *unreasonably fail to take into account the likely effects of climate change* when exercising a wide range of their service,

³⁴ *Lawsuit over warming settled*, 22 August 2007, Long Beach Press Tele (CA) 7A 2007 WLNR 16321424, Westlaw NewsRoom.

³⁵ Peel J, "The Role of Climate Change Litigation in Australia's Response to Global Warming" (2007) 24 EPLJ 90.

planning and development activities? This aspect relates to the need for adaptation to climate change impacts. The answer to this question lies in a consideration of local governments' specific statutory duties: and in their exposure to civil liability claims based in the common law actions of nuisance or negligence.

Specific statutory responsibilities

Local governments, like other statutory authorities, must exercise their powers within the constraints of the legislation establishing them. The preceding discussion indicated some of the grounds on which local governments may find themselves exposed to law suits if they fail to consider the contribution their decisions and activities make to greenhouse gas emissions. The holistic nature of much planning legislation and the references to ecologically sustainable development and intergenerational equity in this and other legislation suggest that greenhouse gas emissions are a relevant factor that should be taken into account when exercising powers under those statutes.³⁶ The same reasoning applies in respect of climate change *impacts*. Where the information is readily available and the impacts of climate change are likely to be significant for any particular project or decision, a duty to consider those impacts and ways of addressing them may now be implied from the terms of the relevant legislation.³⁷

The applicability of this line of reasoning to adaptation issues was most recently confirmed in *Walker v Minister for Planning* [2007] NSWLEC 741. In this case, Ms Walker challenged the validity of a concept plan approval for a residential subdivision and a retirement development at Sandon Point in NSW. The applicant argued the Minister for Planning had approved the Plan without considering whether the flooding impacts of the project would be compounded by climate change and, as such, had failed to give due regard to the principles of ecologically sustainable development. The decision of the Minister was overturned on that ground alone:

Having regard to the subject matter, scope and purposes of the EP Act and the gravity of the well known potential consequences of climate change, in circumstances where neither 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.³⁸

Civil liability of local governments

In addition to their statutory responsibilities, all local governments must abide by the requirements of the common law to act with due regard for the rights of others. The forms of common law liability that local governments are most commonly exposed to are claims in nuisance or in negligence. A nuisance is an "unlawful interference with a person's use or enjoyment of land, or some right over, or in connection with it". A claim in nuisance may lie against people or authorities vested with management and control of a premises or asset if their actions or inactions result in material injury to the property of another.³⁹ The essential ingredients of a claim in nuisance (public or private) include knowledge or foresight of the risk of harm.

A claim in negligence arises when a person suffers harm as a result of the failure of another person to take care to prevent that harm. Unlike claims in nuisance, in order to incur liability in negligence, a duty of care must be found to exist.⁴⁰ A good example of when local governments have in the past incurred liability for their negligence is *Alec Finlayson Pty Ltd v Armidale City Council* (1994) 51 FCR 378; 123 ALR 155; 84 LGERA 225, in which a local council was held bound by a duty of care when considering development applications on contaminated land. The council had

³⁶ *Gray v Minister for Planning* (2006) 152 LGERA 258; [2006] NSWLEC 720 at [115]; *Taralga Landscape Guardians Inc v Minister for Planning* [2007] NSWLEC 59 at [73]-[75].

³⁷ *Gray v Minister for Planning* (2006) 152 LGERA 258; [2006] NSWLEC 720 at [125]-[126].

³⁸ *Walker v Minister for Planning* [2007] NSWLEC 741, per Biscoe J at [166].

³⁹ *Halsey v Esso Petroleum Co Ltd* [1961] 2 All ER 145; [1961] 1 WLR 683.

⁴⁰ See further, McGlone F and Stickley A, *Australian Torts Law* (LexisNexisButterworths, 2005) p 103-110.

re-zoned an industrial site, formerly home to a timber treatment plant, to allow for a large-scale residential subdivision. Council officers were well aware of the industrial use of the land but the land was sold and development consents were given without including conditions relating to or dealing with the contamination. The Council was held subject to a duty of care to impose appropriate conditions before the sale and development of the land:

The complexity of modern life continually places citizens in situations where, in a practical sense, they have to rely on the due performance of functions by authorities in circumstances in which lack of care may create or permit hidden hazards ... had the Council done nothing about the land, it might not have laid itself open to liability ... But once it took steps, and particularly once it decided to grant the first development application, it came under a duty of care in relation to the very action that it was taking. If that action created a hazard, it was the Council's duty to take reasonable care so that the threatened injury or damage might be avoided.⁴¹

Could the same result happen with respect to decisions by local governments made in ignorance – or in denial – of the impacts of climate change? It's not hard to envisage the type of actions or events, triggered at least in part, by the impacts of climate change that could give rise to law suits (premised on claims of negligence or nuisance) against local governments. For instance, such suits could 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; and
- Failure to preserve “public” natural assets in the face of climate change.

Given the vast array of potential areas in which liability may arise, it is fortunate for local governments that there are some very strong legal defences available to them.⁴² Chief among these is the civil liability legislation enacted in each Australian state. The *Civil Liability Act 2002* (NSW) provides a good example. This statute 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*.⁴³ Other principles of relevance are stated in s 42:

- 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.⁴⁴

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

⁴¹ *Alec Finlayson Pty Ltd v Armidale City Council* (1994) 84 LGERA 225 at [84]-[88].

⁴² See further, England P, “Climate Change: What Are Local Governments Liable For?” *Issues Paper 6*, March 2007, Urban Research Program, Griffith University; available at http://www.griffith.edu.au/centre/urp/urp_publications/Issues_Papers/URP_IP6_ENGLAND_Climate_LocGovt_final.pdf, viewed 5 December 2007.

⁴³ *Civil Liability Act 2002* (NSW), s 43(2); *Civil Liability Act 2003* (Qld), s 36(2).

⁴⁴ See also *Civil Liability Act 2003* (Qld), s 35.

would consider those acts or omissions to be reasonable – a sort of lowest common denominator threshold.⁴⁵ This legislation appears to offer a degree of comfort and security for local governments. Three caveats, however, should be mentioned:

1. Judicial interpretation of civil liability legislation

As with all statutes restricting individual rights at common law, the courts are likely to construe specific terms narrowly. For example, to the extent it is still possible to argue that a claim in nuisance is based on strict liability rather than on any test of unreasonableness per se, the Queensland legislation (with terms almost identical to those stated above) may contain a loophole that excludes some claims in nuisance (specifically, those based on actual damage to property rather than an unreasonable interference in the enjoyment of it). The fact that s 36 of the *Civil Liability Act 2002* (Qld), states the principles listed above are to be applied when determining whether a *duty of care* has been breached casts further doubt on the applicability of the relevant section in nuisance cases. As stated above, a breach of a duty of care is not an essential component for a claim in nuisance. The New South Wales legislation may prove to be better drafted in this respect. It expressly states the legislation applies to all forms of civil liability in tort.⁴⁶

2. Shifting benchmarks: what is manifestly unreasonable?

The legislation seems to excuse all but the most unreasonable actions of local governments. While, ordinarily, this provides a pretty sweeping defence, in the climate change arena the benchmark for what is wholly unreasonable behaviour is volatile. For instance, whereas 12 months ago a climate change sceptic may still have cast doubt on whether or not climate change is actually occurring, at least since the Fourth Assessment Report of the Intergovernmental Panel on Climate Change (IPCC), that position now seems untenable. Other landmarks include the Stern Review,⁴⁷ Al Gore's 2006 movie, *An Inconvenient Truth*, and the decisions in *Gray, Massachusetts* and others. In the light of these and other developments, the following actions may arguably now be regarded as "manifestly unreasonable":

- Denying that climate change is real;
- Ignoring the evidence (local and regional) as and when it becomes widely available; and
- Taking decisions that increase vulnerability without at least having regard to available precautionary measures.

3. Knowledge particular to specific local government areas

While much of the scientific evidence about climate change impacts is highly generalised, it is without doubt that more specific and localised information will soon become available. It is questionable whether the defence of compliance with general procedures in s 42 of the *Civil Liability Act 2002* (NSW) and its equivalents in other states will be a reliable one if local governments' general procedures and applicable standards fail to take into account regionally applicable, authoritative predictions about climate change impacts as and when they become available. The duty on local government officers here, as in all other areas, is to ensure their state of knowledge and awareness remains at a level that it is reasonable to expect for a local government of such size and resources.⁴⁸

To summarise, in general, local governments will only be at risk of civil liability – in nuisance or in negligence – for failing to take into account the impacts of climate change if their actions, or inactions, constitute a wholly unreasonable response to the risk of climate change. The problem for

⁴⁵ For comparable legislation in other Australian states, see *Civil Law Wrongs Act 2002* (ACT), s 110; *Civil Liability Act 2002* (Tas), s 38; *Wrongs Act 1958* (Vic), s 83; *Civil Liability Act 2002* (WA), s 5W. See further, McGlone and Stickley, n 40, pp 184-188.

⁴⁶ *Civil Liability Act 2002* (NSW), s 40. On the New South Wales legislation generally, see Villa, *Annotated Civil Liability Act 2002* (NSW), (Lawbook Co, 2004).

⁴⁷ Stern N, *The Economics of Climate Change*, 2007, available at http://www.hm-treasury.gov.uk/independent_reviews/stern_review_economics_climate_change/stern_review_report.cfm (viewed 4 December 2007).

⁴⁸ *Andrew Master Hones Ltd v Cruikshank & Fairweather* [1980] RPC 16; *Mid Density Developments Pty Ltd v Rockdale Municipal Council* (1993) 44 FCR 290. See further, Durrant N, "Professional Liability for Climate Affected Advice" (2007-2008) 13(60) *Queensland Environmental Practice Reporter*, p 114.

local governments is that the goal-posts for what action (or inaction) constitutes a wholly unreasonable response in this area are on the move – as is evident from the case law on the proper exercise of statutory duties. While the civil liability legislation in each state offers a good deal of protection from civil liability at common law, that immunity is not impregnable. The standard for what constitutes wholly unreasonable action is likely to evolve rapidly in the next few years and it will be the task of local governments to follow and implement those evolving standards. The best means of doing this is for local governments to devise and implement a *reasonable* response to climate change considerations.

DEVISING A REASONABLE RESPONSE TO CLIMATE CHANGE CONSIDERATIONS

Climate change law is an emergent body of law rapidly achieving some firm foundations.⁴⁹ In the area of planning and development law, climate change has emerged as an issue falling within statutory ESD principles. Administrative law principles requiring decision-makers to take into account all relevant considerations have been applied on this basis. This reasoning emerged strongly in a mitigation law suit, *Gray v Minister for Planning*, but has now been applied to adaptation scenarios as well.⁵⁰ With respect to civil liability claims, local governments seem less at risk of litigation. However, the applicable statutory defence is a relative one: as our state of knowledge on climate change issues grows, so too will the responsibility of local governments to take into account climate change considerations.

In both the areas of mitigating greenhouse gas emissions and adaptation to climate change, this article has argued the case for local governments to adopt a reasonable strategy for dealing with climate change issues. Adopting a reasonable response will provide local governments with a strong defence to civil liability claims.⁵¹ It will provide good evidence that local governments are acting to incorporate climate change considerations into the exercise of their statutory duties. It may also help to decrease local governments' exposure to law suits based on a failure to reduce greenhouse gas emissions:

[F]or many environmental and other public interest groups, climate change litigation is merely a means of achieving a broader social goal of reducing greenhouse gas emissions. Such groups are significantly less likely to pursue corporations and governments that adopt responsible policies regarding global warming, even if their past environmental records are not entirely clean.⁵²

In the light of all these arguments, the next question for local governments to ask themselves is: what constitutes a reasonable response to the risk of climate change impacts for local governments? At the very least, what actions will suffice to prevent their work being assessed as wholly unreasonable under the relevant civil liability legislation? Obviously the answer to this question, in line with the rest of the law in this area, is in a state of flux. However, even at this stage, three emerging legal principles can be identified and are offered here to help stimulate further debate.

Climate change is a relevant procedural consideration

Recent case law has highlighted the need for decision-makers to identify and assess greenhouse gas emissions when implementing their statutory responsibilities, including development assessment. If recent US judicial pronouncements are followed, the requirement is not necessarily confined to major projects – now often regulated by state governments – that have a large and direct impact on greenhouse gas emissions. On the contrary, the obligation arises from the nature of the statutory duties

⁴⁹ Lyster R, "Chasing Down the Climate Change Footprint of the Private and Public Sectors: Forces Converge" (2007) 24 EPLJ 281.

⁵⁰ *Walker v Minister for Planning* [2007] NSWLEC 741.

⁵¹ As per the last limb of the *Civil Liability Act 2002* (NSW), s 42, above. See also *Civil Liability Act 2003* (Qld), s 35.

⁵² Smith J and Shearman D, *Climate Change Litigation*, (Presidian Legal Publications, Adelaide, 2006), p 172. The onus on decision-makers to adopt "reasonable" policies and responses is also signalled by the *Environmental Protection Act 1994* (Qld), s 436(2), which states that compliance with the general environmental duty – by taking all reasonable and practicable measures to reduce or eliminate the harm – is a good defence to any charge of committing environmental harm.

being exercised rather than the amount of emissions per se.⁵³ In the light of this emerging law, local governments should progressively incorporate climate change assessments into their planning, development control and other activities. So far as possible, they should aim to do this in a transparent and accountable manner so that, if queried, the appropriateness of their actions cannot be doubted.

This requirement is essentially procedural in nature. In line with other areas of administrative law, the courts are less concerned with the substance of the decision finally arrived at than with the methods used to arrive at that decision – were they fair, reasonable and complete? Did decision-makers give “real and genuine consideration” to the relevant issues? Did they, for instance, gather and assess relevant information in a degree of detail appropriate to the seriousness of the risks involved? In practical terms, the extent of the inquiry that must be made will depend on many factors – the resources of the Council, the availability of relevant and detailed information, the nature of the proposed development or action and, where applicable, the nature of the statutory duty involved. Whilst it is not generally open to the courts to query the amount or nature of resources allocated to this task, basic administrative law principles require that decision-makers must consider all matters that are relevant to their decision and exclude those that are not. Judicial reasoning endorses the view that greenhouse gas emissions may qualify as a relevant consideration even in the absence of a specific statutory reference to the issue.⁵⁴

Provided local governments make appropriate inquiries, and consider and assess all the relevant information, the courts, as yet, have been unwilling to attribute to decision-makers a legal obligation to mitigate or reduce emissions to any prescribed level. Needless to say, that does not preclude local governments from setting and implementing their own targets for reducing greenhouse gas emissions.⁵⁵

The law’s concern with procedural compliance (delete propriety?) is also evident in the area of adaptation to climate change impacts. For instance, a public authority may rely on evidence it has complied with its general procedures and any applicable standards as a relevant consideration in civil liability claims.⁵⁶ However, as argued above, there is also a substantive bottom line applicable in this area: decisions of council should not be manifestly unreasonable. How can local governments avoid taking action that is “manifestly unreasonable” in an area characterised by uncertainty, long term impacts and rapidly accruing information? The emerging “best practice” solution to this dilemma is for councils to integrate climate change considerations into their existing risk management strategies. The Australian Greenhouse Office (AGO) has recently provided guidelines for incorporating climate change impacts into councils’ risk management strategies. The recommended process is qualitative, relatively simple and flexible in order to meet the needs of different councils.⁵⁷ Implementing a comprehensive risk management process would almost certainly provide councils with ample evidence they have complied with “general procedures and any applicable standards” for the time being. Over time, as in the area of greenhouse gas emissions, state and national standards prescribing applicable measures are likely to emerge. Where relevant standards are applicable, these should be incorporated within the relevant risk management procedures.

Aside from these basic legal requirements, councils are still largely free to set their own goals for reducing greenhouse gas emissions and dealing with the impacts of climate change. That degree of freedom is likely to diminish, however, as national and/or state-wide emissions targets, standards and regulations come into play.

⁵³ *Gray v Minister for Planning* (2006) 152 LGERA 258; [2006] NSWLEC 720.

⁵⁴ *Massachusetts v Environmental Protection Agency* 549 US (2007) (No 05-1120).

⁵⁵ It is interesting to note that although most of the major urban councils have set ambitious targets for reducing their overall emissions, their actions to date seem to fall far short of the type of “deep cuts” that will be necessary to achieve their own, publicly stated, goals. Again, that matter, for the time being, is non-justiciable.

⁵⁶ See also *Civil Liability Act 2003* (Qld), s 35.

⁵⁷ SMEC Australia, *Climate Change Adaptation Actions for Local Government* (Australian Greenhouse Office, 2007), p 18.

Stringent conditions to respond to climate change impacts are reasonable

Long before the statutory endorsement of such lofty principles as intergenerational equity and the precautionary principle, the common law has required of statutory authorities that their powers be exercised reasonably.⁵⁸ For instance, local governments must ensure that, when approving development applications, the conditions of approval are reasonable in the circumstances of that development.⁵⁹ In several cases, the requirement for reasonableness has frustrated attempts to secure mitigation or adaptation measures in the face of climate change.⁶⁰ Typical of such reasoning is *Daikyo (North Queensland Pty Ltd) v Cairns City Council* [2003] QPELR 606; [2003] QPEC 22. This case involved an application for residential and tourist development at Palm Cove. 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. However, his Honour Skoien SJDC determined:

(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.⁶¹

Since the decision in *Daikyo's case*, concerns about the effects of climate change have increased dramatically. This has led to a discernible shift in some judicial thinking on the issue of reasonableness in conditions. A good example is the decision in *Charles Howard Pty Ltd v Redland Shire Council* [2007] QCA 200. In this case, the appellant wished to build a family home on a portion of his land that was below 2.4 m Australian Height Datum and was subject to inundation once in 100 years. The land was classed as Residential A but that specific site was now designated a Special Protection Area in the Council's strategic plan. The appellant's application to place fill on the land (prior to building there) was approved but made subject to a condition that specific portion of land was not built on. Council effectively required the applicant to build on a different part of his land, at a site that was a proposed urban residential zone and not subject to inundation by the Q100 flood level. In the Planning and Environment Court, the judge upheld the Council's condition accepting that, taking into account the possible impacts of climate change (among other things), the condition was a reasonable one. Before the Court of Appeal, that decision was upheld. The Court also dismissed claims the judge had applied a best sites approach (in confirming the alternative location preferred by Council) or that the condition was so significantly different to the original application there was in fact no approval at all.

A number of other recent cases have cited climate change as a relevant factor when deciding whether or not to approve a development application.⁶² Nevertheless, despite this emergent body of law, councils wishing to exceed the vagaries of the common law standard of what is a "reasonable and relevant" condition are advised to include explicit reference to their position on climate change impacts in their planning schemes. This could be linked with, and justified by, reference to such ultimate planning goals as ecologically sustainable development, intergenerational equity and the precautionary principle.

⁵⁸ *Associated Provincial Picture Houses Ltd v Wednesbury Corp* (1948) 1 KB 223.

⁵⁹ *Newbury District Council v Secretary of State for the Environment* [1981] AC 578; *Cardwell Shire Council v King Ranch Australia Pty Ltd* (1984) 53 ALR 632; 54 LGRA 110.

⁶⁰ *Greenpeace Australia Ltd v Redbank Power Co Ltd* (1995) 86 LGERA 143; *EDS v Auckland Regional Council and Contact Energy*, A183/2002; *Mackay Conservation Group Inc v Mackay City Council* [2005] QPEC 94; [2006] QPELR 209.

⁶¹ *Daikyo (North Queensland Pty Ltd) v Cairns City Council* [2003] QPELR 606; [2003] QPEC 22 at [27]. For a similar line of reasoning in a New Zealand case, see *EDS v Auckland Regional Council and Contact Energy*, A183/2002.

⁶² *Hain v Glen Eira* [2006] VCAT 2493; *Taralga Landscape Guardians Inc v Minister for Planning* [2007] NSWLEC 59; *Jackson Teece v Waverly Council* [2007] NSWLEC 69; *14 Regent Street Pty Ltd v Hobart City Council* [2005] TASRMPAT. See further, O'Hart A, *Climate Change in Planning Decisions and Environmental Impact Assessment: Recent Cases Seminar* delivered to the Planning Institute of Australia, April 2007.

Reducing greenhouse gas emissions is for the public benefit

Whilst climate change litigation has generally not succeeded in preventing new development that will increase greenhouse gas emissions, climate change arguments have been used effectively in *support* of greener development projects. For instance, proponents of renewable energy have had some success in drawing on evidence of climate change to support their applications for new projects. In *Taralga Landscape Guardians Inc v Minister for Planning* [2007] NSWLEC 59, Preston CJ, in approving an application for a new wind farm, accepted that the public benefit to be gained by support for renewable energy outweighed the visual amenity and environmental objections of local residents. As in *Gray's case*, the principles of ecologically sustainable development, including intergenerational equity and the precautionary principle, formed an important aspect of the judge's reasoning:

The principles of sustainable development are central to any decision-making process concerning the development of new energy resources. One of the key principles underlying the notion of sustainable development is the concept of intergenerational equity. Intergenerational equity is premised on the idea that "the present generation should ensure that the health, diversity and productivity of the environment is maintained or enhanced for the benefit of future generations": Australian Government, 1992 *Intergovernmental Agreement on the Environment* at 3.5.2. ... Renewable energy sources are an important method of reducing greenhouse gas emissions and preserving traditional energy resources for future generations.⁶³

CONCLUSION

In the past, matters of causation, proof and political discretion were seen as insurmountable obstacles to successful litigation against greenhouse gas emitters. That position is now starting to change, not uniformly but, at least in some cases, quite dramatically. Local governments are not immune from exposure to law suits in this area. Admittedly there may well be "bigger fish to fry" (for instance, state planning and development agencies taking control of major resource developments) but, if the doors close on this avenue of redress – through statutory interventions, the restrictive interpretation of relevant statutes or whatever (perhaps even because of a more enlightened attitude being adopted in these departments!) – then local governments that are not "towing the line" or taking on board the new challenges could well find themselves next in the firing line. To avoid potential litigation, local governments should start to assess, as a matter of routine, the impact of their decisions and activities on greenhouse gas emissions and also to consider, where possible, ways and means of reducing that impact. These obligations are essentially procedural in nature. As yet, there is no legal obligation upon local governments requiring them to take action to reduce their greenhouse gas emissions.

With respect to adaptation to climate change, the law requires that local governments develop a reasonable response – or more accurately, a *not wholly unreasonable* response to climate change impacts. Provided they do this, local governments should remain immune from civil liability for any failure to take into account predicted climate change impacts. An essential ingredient of any developing test of what is a reasonable response must include a genuine attempt by local government officers to stay informed of current research applicable in their jurisdiction and of changes to relevant policies and regulations. Once that knowledge becomes available, as in the *Finlayson case*,⁶⁴ it is incumbent upon them to incorporate it into their decision-making as best they can. This might involve considering the range of options available – including technical, engineering or siting solutions – and deciding whether or not conditions are necessary to ensure solutions are incorporated into new development now or at some point in the future. The law relating to the reasonableness of development conditions may have formerly prevailed against the imposition of unusually stringent conditions but, at least in this area, that no longer seems to be the case.

In general, local governments are still free to choose what measures they adopt and how ambitious their response to climate change issues will be. However, whilst they are still free to choose

⁶³ *Taralga Landscape Guardians Inc v Minister for Planning* [2007] NSWLEC 59 at [73]-[75].

⁶⁴ *Alec Finlayson Pty Ltd v Armidale City Council* (1994) 51 FCR 378; 123 ALR 155; 84 LGERA 225.

the substance of their response, recent legal developments suggest that climate change considerations must now at least be given genuine consideration.