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Presentation

Sea Levels Raising Complex Legal Issues

Biography

Michael Bidwell is in his final year at Griffith University undertaking a Bachelor of Laws and Bachelor of Science (Environment). He spent the first 19 years of his life growing up in a small town in Michigan in the United States. He moved to Brisbane in 2012 on his own to undertake the dual degree at Griffith University and immerse himself in the planning and environmental legal context of Queensland and Australia. Michael has previously worked in-house as a paralegal for a few months at a national waste management corporation. He undertook clerkships at McCullough Robertson, Herbert Smith Freehills and Allens in their planning, environment and projects teams. Michael has accepted a graduate offer commencing 2017 with McCullough Robertson and currently works as a research clerk in their planning and environment team.

Michael has also participated in extensive community engagement internationally, nationally and locally. He volunteered with an organisation to provide schoolbags and supplies to children in East Timor in 2012 and assisted local communities in Vietnam in 2014. Michael has undertaken conservation projects in Tasmania and Brampton Island. Whilst assisting local charities in Brisbane, Michael has also advocated for domestic and sexual violence victims. He co-created the first university club in Australia dedicated to preventing gender-based violence: Griffith Mentors in Violence Prevention. Michael combines his analytical and technical skills with his diverse work and community engagement experiences to offer a new perspective to the Queensland framework on planning and environmental law.

Abstract:

Climate change is a 'wicked' problem – its impacts and their timing are uncertain and there are no easy solutions to addressing the root causes. It is also a highly politicised issue, with little or no stability in the legal and policy regime governing it. In these difficult circumstances, what can planners, local governments, legislators and the courts hope to achieve, particularly in Queensland, Australia? One of the difficulties with amending planning instruments to take into account the impacts of climate change is the prospect of a public backlash if land is re-zoned or development impeded by new measures to protect against future hazards such as sea level rise.

Compensation for an affected owner due to an adverse planning change may be potentially claimed under the *Sustainable Planning Act 2009* (Qld) in certain circumstances. This is conflicted with compensation that may be claimed through the courts under civil liability legislation by affected owners from the impacts of sea level rise due to nuisance or negligence from local governments, or their neighbours, failing to adapt to climate change impacts. Although these compensation claims have not been popular, as of yet, there is a risk for local governments and communities in future as impacts from sea level rise continue to increase in frequency and severity. In the absence of any consistent legislation, the courts have had to determine climate change issues raised on a case by case basis.

Queensland courts have sometimes referred to '*ecological sustainable development*' but with completely different results. The benefits of an integrated planning system whereby state, territory and local governments incorporate consideration of the impacts of climate

change in land-use planning decisions are worth exploring. Transparent and extensive community consultation processes are essential to ensure that communities' '*acceptable levels of risk*' are incorporated in land-use planning decisions regarding sea level rise.

Background:

10 years ago, climate change came of age as an issue of public and regulatory concern. The year saw the release of Al Gore's film on 'the climate crisis', *An Inconvenient Truth*, the issue of the Stern Report, predicting the enormous economic costs of tardy action to reduce greenhouse gas emissions and the occurrence of extreme weather events, such as the 'worst drought in 1000 years' and devastating 'mega-fires' (Peel, 2007, p. 90).

Despite this decade of political chatter, the *Sustainable Planning Act 2009* (Qld) (**SPA**) and its future successor, *Planning Act 2016* (Qld), 'do not require consideration of the effects of a changing environment, including climate change impacts, on the suitability or long term viability of the development' (McDonald, 2011, p. 50). The State Planning Policy April 2016 must be represented in new local government planning schemes but it only states that risk-management approaches *should* be employed for climate change. 'A failure to put in place mandatory regulatory initiatives that ensure global warming impacts are adequately factored into economic decision-making processes calls into question the authenticity of governments' commitment to the policy goal of ecologically sustainable development' (Peel, 2007, p. 92). Without regulatory guidance, the courts have been determining what ecologically sustainable development should entail in a changing climate.

'Climate change litigation has proved to be a vehicle through which matters that are important to communities are being brought to the attention of the governments and hence, act as a catalyst for executive action' (Preston, 2011, p. 236). There has been a wide range of cases relevant to climate change but the purpose of this paper is to focus on sea level rise. 'In Australia, a sea level rise of a metre or more during this century is plausible - it could be less or much more' (Abel et al. 2011, p. 281). Such uncertainties are continuing to make for interesting common law developments. This paper analyses the potential compensation claim for an affected owner by a planning scheme amendment to account for sea level rise, explores compensation claims due to negligence or nuisance from the negative effects of sea level rise, examines cases that have become complicated by sea level rise and briefly suggests the benefits of an integrated national planning system for developments impacted by climate change.

Compensation for an affected owner due to an adverse planning change:

Section 704 of the SPA sets out the circumstances that can give rise to a liability on the part of the local government to pay compensation for what has been traditionally known as 'injurious affection' consequent upon changes in a planning scheme which impact on development rights. The starting point is that a person has no ability to claim compensation unless the person takes the initiative under section 95 of the SPA to ask the local government whether it will deal with a development application under the superseded planning scheme. In order to trigger the possibility of claiming compensation, the request must relate to development which would have been appropriate before the planning scheme changes. If the local government decides the development application under the superseded scheme, no liability to compensation can arise.

'Given the key role of local governments in the direct provision of community services and infrastructure, it is crucial that this level of government responds to climate change in a manner consistent with relevant legal, environmental and social obligations and responsibilities' (Scott et al., 2008, p. 52). Local governments should be mindful that planning scheme changes to incorporate sea level rise, and other climate change effects, will attract a period of one year where an applicant can request the previous planning scheme to be applied. 'Although local

governments may not be first on the hit list for potential litigants, the threat of litigation is becoming increasingly more real' (England, 2008, p. 210). Importantly, while the refusal of a request to apply the former scheme triggers the potential for a compensation claim, neither that fact nor the subsequent decision on a development application crystallise or quantify the claim. The applicant would need to separately prove and quantify the loss of market value as a result of the planning scheme change.

'Slow rate of sea level rise coupled with urgent development demands and legal pressures thus discourage councils from setting land aside for future retreat' (Abel et al. 2011, p. 283). This may be why local governments have been hesitant to amend their planning schemes but these amendments will be necessary if local governments intend to mitigate and adapt to the impacts of sea level rise. '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' (England, 2008, p. 221).

The risks associated with compensation claim are quite low. As illustrated above, a local government can entirely avoid the compensation claim if it follows the procedure to apply the superseded planning scheme upon request from the applicant. Even if a local government refuses to apply the superseded scheme, the applicant will have to go through the process to receive compensation but this will not even approve the development. 'The nexus between public and private land management is key to an integrated approach and the recognition that policy responses require a mix of mitigation and adaptive measures' (Norman, 2009, p. 296). Rather than a 'one size fits all coastlines' mentality, local governments should engage their communities in developing planning scheme amendments that will best protect against projected sea level rise without disturbing the desire for economic and social growth.

Compensation due to negligence or nuisance:

Sections 35 and 36 of the *Civil Liability Act 2003* (Qld) (**CLA**) set out the circumstances upon which a local government can be liable through negligence to pay compensation for an alleged wrongful exercise of or failure to exercise a function of a public authority. The two main factors for establishing a negligence claim include duty of care and foreseeability.

All local governments owe a duty of care to avoid injury to others who might reasonably be foreseen as likely to be injured by their acts or omissions. 'A local authority will only be held liable for an act or omission where it has acted unreasonably, and this will be determined with reference to the limitations on financial and other resources available to the local authority' (Scott et al. 2008, p. 56). Several factors are taken into account when considering whether a duty of care exists, giving rise to negligence, including knowledge, the degree of control, specificity and vulnerability of the group that is claiming the existence of the duty. McDonald & England (2007, p. 8) argued 'authorities will meet their duty of care simply by warning of risks and allowing property owners to undertake their own protective works (subject, of course, to the condition that those words do not render neighbouring properties more vulnerable).' Considering the knowledge of sea level rise and vulnerability of coastal development has increased the last nine years, it is arguable the duty of care extends beyond simply warning of risks.

The test for foreseeability in these circumstances was outlined in *Alec Finlayson Pty Ltd v Armidale City Council* (1994) 51 FCR 378 as whether a reasonable person in the defendant's position would have foreseen that their conduct involved a risk of injury to the plaintiff or to a class of persons including the plaintiff. In that case, a local government rezoned land for residential development and subsequently granted subdivision approval and building consents despite the local government being aware of dangerous substances on the site from a previous timber treatment plant. Unfortunately, a case has not determined the foreseeability of the impacts of sea level rise but local governments should be cautious by ensuring coastal developments mitigate risk and are adaptable.

There are a few defences available to local governments against claims of negligence. Section 15 of the CLA states a local government does not have a proactive duty to warn of an obvious risk. Section 13 of the CLA clarifies that an obvious risks include risks that are patent or a matter of common knowledge and can even have a low probability of occurring. Section 16 of the CLA states a local government will not be liable for the materialisation of an inherent risk which is something occurring that cannot be avoided by the exercise of reasonable care and skill. While some impacts of sea level rise may potentially fall under these defences, local governments should once again err on the side of caution. Section 36 of the CLA limits the liability of public authorities stating the act or omission must be so unreasonable that no other local government would consider the act or omission a reasonable exercise of its functions. 'Given the wide disparity in local authority responses to climate impacts to date, this standard sets the bar for reasonable conduct very low indeed' (Preston, 2011, p. 9).

Private nuisance is committed under the common law where one person substantially and unreasonably interferes with another person's right to the use and enjoyment of their land. Actions in nuisance may have some benefits over claims in negligence. Firstly, actions in nuisance do not require proof of a breach of duty. 'It is the interference created by the conduct, rather than the conduct itself that must be shown to be unreasonable and substantial' (McDonald & England, 2007, p. 11). To determine whether the interference is substantial and unreasonable, the court might consider things like the locality and standard of comfort that a person living in the area would reasonably expect, the duration, frequency or extent of the interference. The court might also take into account whether it was possible for the defendant to take precautions to prevent causing the nuisance. These nuisance claims would be enforceable upon neighbours or land owned by local government.

Are the impacts of sea level rise foreseeable? Could these impacts be viewed as obvious risks? As some local governments implement the effects of sea level rise in their planning schemes, what becomes the standard for unreasonableness? These questions await judicial clarification, but as coastal property values increase, so too will the stakes for local governments who face ever large claims for compensation.

Cases dealing with legal issues complicated by sea level rise:

In *Daikyo (North Queensland Pty Ltd) v Cairns City Council & Anor* (2003) QPELR 606, the Planning and Environment Court of Queensland (**P&E Court**) held that setting marine inundation levels for a development in Cairns to protect it from cyclonic wave effects at levels above those for comparable development was neither reasonable nor reasonably required. In *Mackay Conservation Group Inc v Mackay City Council & Anor* [2006] QPELR 209, the P&E Court held that recommendations from the Department of Natural Resources & Mines to protect against 1 in 500 year inundation events were considered impractical.

After analysing all the Australian case law surrounding climate change, Scott et al. (2008, p. 54) found 'there remains considerable divergence in opinion regarding the seriousness of climate change among the judicial fraternity.' Many of the cases refer to the principle of ecologically sustainable development. 'Ecologically sustainable development involves the internalisation of environmental costs into decision making for economic and other development plans, programs and projects likely to affect the environment' (Hon. Justice Preston, 2007, 636). As the knowledge about and value of environmental costs increases, social and legal expectations of what local governments are required to do will also be heightened.

Between the 1960's and 1970's, Byron Shire Council constructed an artificial headland protected by a rock seawall. Neighbouring owners commenced proceedings in 2010 alleging that the structure had caused beach erosion and consequently exposed their properties to seawater and wave action. In *Ralph Lauren 57 v Byron Shire Council* [2016] NSWSC 169, Justice Hidden awarded the owners $2,750,000 in compensation for financial loss

in relation to the local government's historical works and they were enabled to submit applications to undertake lawful protective works to rectify the damage caused.

'Courts, with their independence from government and capacity to develop legal principles of broad application, can offer an attractive mechanism for spurring legal change where political processes are deadlocked' (Huggins, 2008, p. 186). The risk would be judges potentially making policy decisions which goes against the separation of powers; however, their decisions must be based on the legislation and planning schemes available. 'But the law has a long memory, so courts of the future will reflect on the state of knowledge currently at hand to determine whether decision-makers of today did enough to avoid or minimise the worst exposures to climate change' (McDonald & England, 2007, p. 22). Coupled with a trend of increasingly severe weather events, sea levels will continue to create complex legal issues.

Benefits of a national sustainable coastal planning framework:

'There is rarely any common approach discernible, with each jurisdiction designing regulations in accordance with its own circumstances and policy priorities' (Peel, 2007, p. 95). The lack of action to address climate change at the national political level has encouraged environmental groups and individuals to take their matters to the courts. 'Although it may not be practical for the federal government to have full responsibility for planning for coastal management, it should outline the responsibilities of the different levels of government and promote a consistent approach to adaptation strategies allowing flexibility for regional differences (Lipman & Stokes, 2011, pp. 196-197). If government wants the community to adapt, it must first examine the legislative framework within its own tiers and agencies.

'If regional planning is done well, there should be little role for spot rezonings if a proper process of strategic planning is undertaken' (Ghanem & Ruddock, 2011, p. 30). This paper cannot clarify the roles entailed in an integrated planning system but the federal, state, territory and local governments should consider how each can respond to the impacts of sea level rise and climate change. 'Extrapolating from regional to local is largely a matter of reviewing past occurrences and then examining the change in frequency and intensity on the regional scale' (Scott et al. 2008, p. 68). The error factor involved in regional planning cannot be discounted but this could be a key role for the state and territory governments. The federal government would likely organise the funding and continued research into mitigation and adaptation strategies for coastal development. Local governments would be required to incorporate these federal and state policies into their planning schemes for consistency, including assessing their individual members' acceptable levels of risk.

Conclusion:

The significance of climate change litigation has continually increased as communities seek redress from the courts due to stagnant political action. The compensation risk is quite low for a local government that introduces coastal mitigation and adaptation measures into their planning schemes. On the other hand, the risk of compensation for negligence and nuisance by failing to address sea level rise and climate change appears to be increasing. Cases are continually being complicated by sea level issues, most notably, the recent decision in New South Wales. The benefits of a national sustainable coastal planning framework should seriously be considered, primarily in respect of addressing sea level rise. People will continue to migrate to the coast, leading to large concentrations of population, property and infrastructure that may already be at risk to natural coastal processes and/or man-made impacts. The significance of climate change litigation in Australia, in terms of both the direct outcomes achieved and the flow-on implications for political and corporate decision making, are likely to increase as sea level continues to rise.

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Sea levels raising complex legal issues

EIANZ Conference 2016

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10 years ago…

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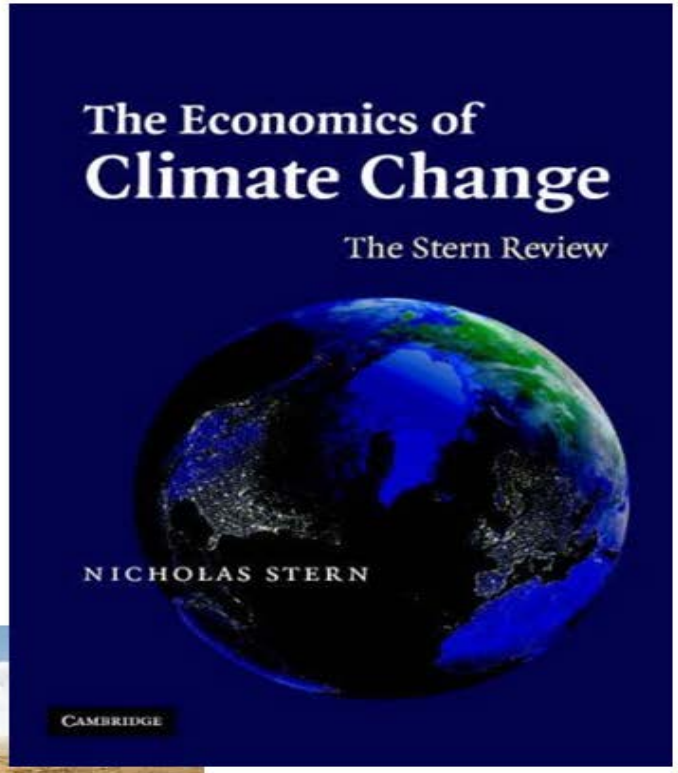

Outline

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- Compensation for an affected owner due to an adverse planning change
- Compensation due to negligence or nuisance
- Cases dealing with legal issues complicated by sea level rise
- Benefits of a national sustainable coastal planning framework

Adverse planning change

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- Request for application of superseded planning scheme
- Council refuses this request and subsequently refuses the development application
- Applicant separately proves and quantifies the loss of market value as a result of the planning scheme change

Negligence

- Primary elements include:
  - ☐ duty of care; and
  - ☐ foreseeability

- Defences include:
  - ☐ obvious risk;
  - ☐ inherent risk; and
  - ☐ no other public authority would consider the act or omission a reasonable exercise of its functions

Nuisance

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- Primary elements include:
  - ☐ substantial; and
  - ☐ unreasonable interference

Legal issues complicated by sea level rise

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- *Daikyo (North Queensland Pty Ltd) v Cairns City Council & Anor* (2003) QPELR 606
  - ☐ setting marine inundation levels not acceptable
- *Mackay Conservation Group Inc v Mackay City Council & Anor* [2006] QPELR 209
  - ☐ 1 in 500 year inundation events impractical
- What is 'ecologically sustainable development'?

Ralph Lauren 57 v Byron Shire Council [2016] NSWSC 169

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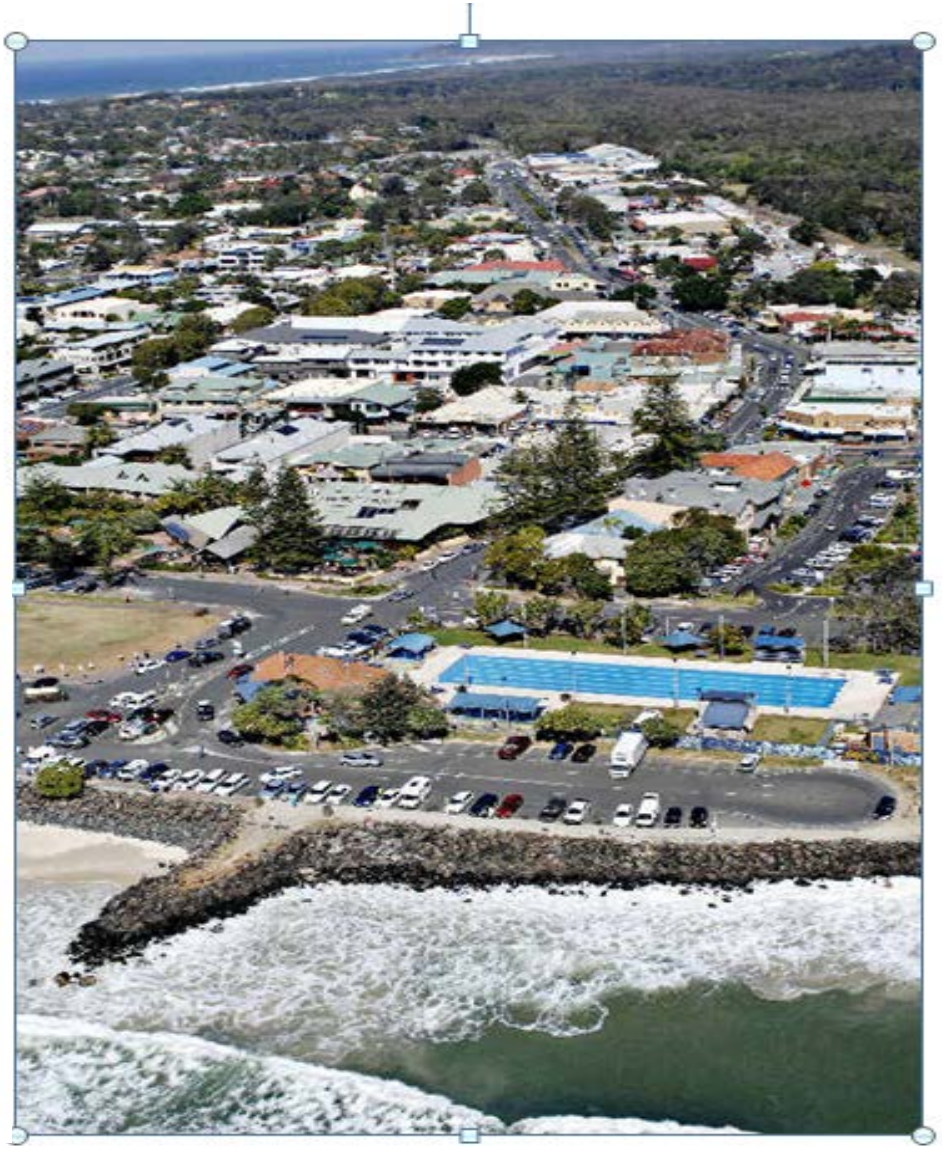
- $2,750,000 in compensation
- Residents could undertake lawful protective works to rectify the damage caused



National coastal planning framework

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- Necessary to outline responsibilities of different levels of governments
- Extrapolating from regional to local is largely a matter of reviewing past occurrences and then examining the change in frequency and intensity on the regional scale
- Error factor in regional planning cannot be discounted
- Local governments remain consistent with state and federal policies
- Local governments conduct community consultation for acceptable levels of risk

Conclusion

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- Climate change litigation continues to increase
- Compensation for adverse planning change has a low risk
- Compensation for negligence and nuisance is increasing
- Benefits of a national sustainable coastal planning framework should be considered

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