

An Inconvenient Risk

Climate change and local government liability

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YOU MIGHT HAVE READ ABOUT SOME HACKED E-MAILS SHOWING THAT SCIENTISTS COVERED UP DATA CONTRADICTING GLOBAL WARMING. WELL, I CAN ASSURE YOU THAT, UM...



LOOK!...
A POLAR BEAR
CLINGING TO A
MELTING GLACIER!



FULLER
LAW
LONDON

Introduction & Overview

- Climate change predictions
- Climate change impacts
- Relevant local government statutory powers
- Law of negligence
- Duty of care
- Standard of Care
- State Coastal Planning Policy
- Defences
- Reducing liability

Climate change predictions

- IPCC Assessment Report 4 2007
 - 2.4 - 6.4°C rise in temperature by 2100
 - 0.26 – 0.59m sea level rise
 - Did not include effects of dynamical processes related to ice flow
- CSIRO 2008
 - Revised prediction 0.09 – 0.88m sea level rise
 - Includes effects of dynamical ice flows
- Sea level change in WA 2010 (Dept Transport)
 - Adopt highest projections of sea level rise in AR4
 - Allow for ‘scaled-up ice sheet discharge’
 - Assume sea level rise 0.9m by 2110
- US National Oceanic and Atmospheric Administration
 - 0.2 – 2.0m sea level rise by 2100
- Extreme weather events

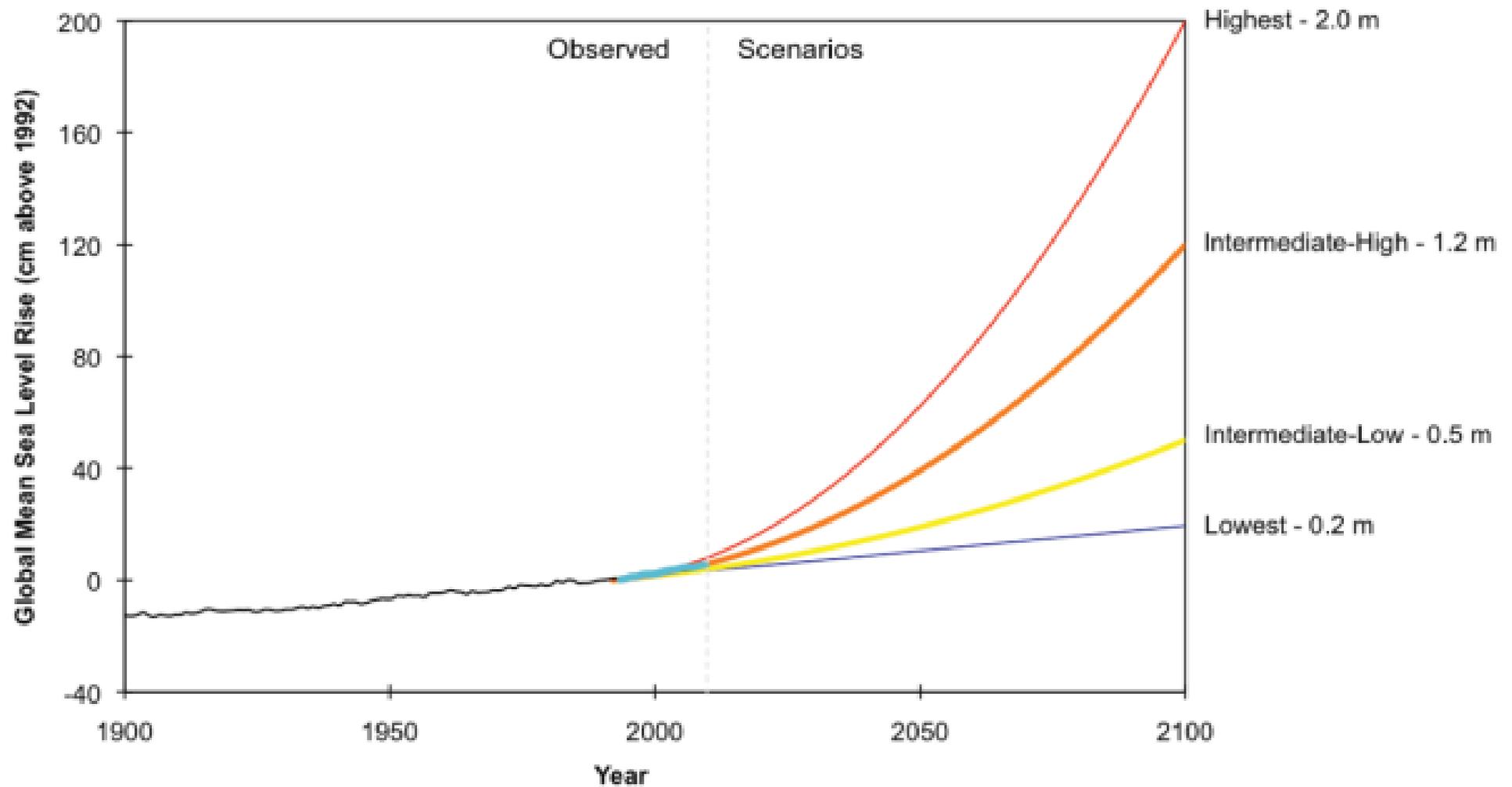


Fig. 1. Source: [Global Sea Level Rise Scenarios for the United States National Climate Assessment](#), NOAA (2012)

“Antarctic ice melting 10 times faster than 600 years ago” Mon Apr 15, 2013



Positive proof of global warming.



***18th
Century***

1900

1950

1970

1980

1990

Climate change impacts

- Storm water runoff and flooding
- Flooding of coastal properties
- Damage to infrastructure (roads etc)
- Structural damage to buildings
- Impacts on public open spaces
- Need for adaptive strategies



Local government statutory powers relevant to sea level rise

- Power to approve development
 - Scheme; *Planning and Development Act 2005*
- Power to make policy/quasi-legislative decisions
 - Adopt planning policies, management strategies etc
 - Initiate scheme amendments
- Power to undertake action or require actions to be undertaken
 - e.g works for prevention of flooding – s. 3.27, Sch. 3.2 LGA

Law of Negligence

- Sources of law on negligence
 - Common law
 - Civil Liability Act 2002
- Elements of a negligence claim
 - Duty of care
 - Breach of duty of care
 - Breach caused damage to plaintiff
 - Damage not too remote
- Circumstances of each case

Duty of care

- Duty to exercise statutory powers with reasonable care - *Caledonian Collieries Ltd v Speirs*
- Duty depends on statutory framework - *Precision Products (NSW) v Hawkesbury City Council*
- Duty of care when approving development
 - *Alec Finlayson v Armidale City Council* – contaminated land
 - *Albert Shire Council v Bamford* – land unsuitable for building
 - *Precision Products (NSW)*– land affected by aircraft noise
- Conclusion: local government subject to duty of care when determining application for planning approval

Standard of care

- Breach of duty of care must be proven by plaintiff
- Standard of care: what reasonable person (Council) would do in response to a foreseeable risk - *Wyong Shire Council v Shirt*
- Foreseeable = “not far-fetched or fanciful”
- To determine response of reasonable person, have regard to:
 - Magnitude of risk
 - Probability of its occurrence
 - Expense, inconvenience and difficulty of taking action
 - Conflicting responsibilities
- Assessed having regard to information available at time

APPROVED



Legislative & policy framework

- Planning and Development Act
- Planning scheme provisions
 - E.g. clause 10.2(m) Model Scheme Text requires consideration of:

“whether the land to which the application relates is unsuitable for the proposal by reason of it being, or being likely to be, subject to flooding, tidal inundation, subsidence, landslip, bush fire or any other risk;”
- State Planning Policy 2.6
- Other planning instruments

State Coastal Planning Policy

- SPP 2.6 – gazetted 10 June 2003
- Clause 5.1 (xxii) – development to be positioned to avoid risk of damage from coastal processes
- Schedule 1 - Coastal development setback guidelines
 - S1 – setback for extreme storm sequence (40m)
 - S2 – setback for chronic erosion/accretion (20m)
 - S3 – setback for sea level change (38m) (2001)
 - Total setback – $S1 + S2 + S3 = 98m$
- WAPC Position statement
 - Revision to SPP 2.6 based on AR4 and CSIRO 2008 data
 - 0.38m sea level rise increased to 0.9m
 - S3 setback – increased to 90m
 - Total setback = 150m

Compliance with setback guidelines

- Compliance with Part D, Schedule 1
- s. 5W Civil Liability Act
 - a. the functions required to be exercised by the public body or officer are limited by the financial and other resources that are reasonably available to the public body or officer for the purpose of exercising those functions
 - ...
 - d. the public body or officer may rely on evidence of its compliance with the general procedures and applicable standards for the exercise of its functions as evidence of the proper exercise of its functions in the matter to which the proceedings relate.

Getting back to polar bears...



Polar bears finally migrate to Antarctica

Variation to setback guidelines

- Clause 5.1 (xxiii) SPP 2.6
(xxiii) Recognise, if specifically appropriate, the variations and possible exemptions to the physical processes setback (in Schedule One) that may be considered to accommodate varying physical circumstances and desirable, essential or practical community development outcomes (as specified in the Schedule).
- Clause F.1, Part F – infill development
 - Where infill development of existing coastal subdivision, minimum setback of S1 applies.
 - Therefore, no setback for chronic erosion or sea level rise.
- Thus reasonably foreseeable infill development affected by coastal processes in 100 year planning
- Compliance with SPP 2.6 not necessarily sufficient to satisfy duty
- Potential liability, unless protective/ adaptative measures undertaken to prevent damage

State Coastal Planning Policy 2012

- Draft State Coastal Planning Policy 2012
- Calculating setback for coastal processes
- Coastal hazard risk management and adaptation planning
 - Identify risk (notification):
VULNERABLE COASTAL AREA – This lot is located in an area likely to be subject to coastal erosion and/or inundation over the next 100 years.
- Where “unacceptable” risk to development adaptation measures taken:
 - Avoid new development; Planned/Managed Retreat; Accommodation measures; Coastal protection works
- Whether reducing risk to “acceptable” level discharges standard of care

Defences – s. 5X Civil Liability Act

- ALGA Report 2011 -

“...a Council will not ordinarily be liable for any act or omission unless it can be shown that it was manifestly unreasonable”

- Section 5X Civil Liability Act 2002

“In a claim for damages for harm caused by the fault of a public body or officer arising out of fault in the performance or non-performance of a public function, a **policy decision** cannot be used to support a finding that the defendant was at fault unless the decision was so unreasonable that no reasonable public body or officer in the defendant’s position could have made it.”

- “policy decision” vs. “operational decision”
- Applicable standard to development approval

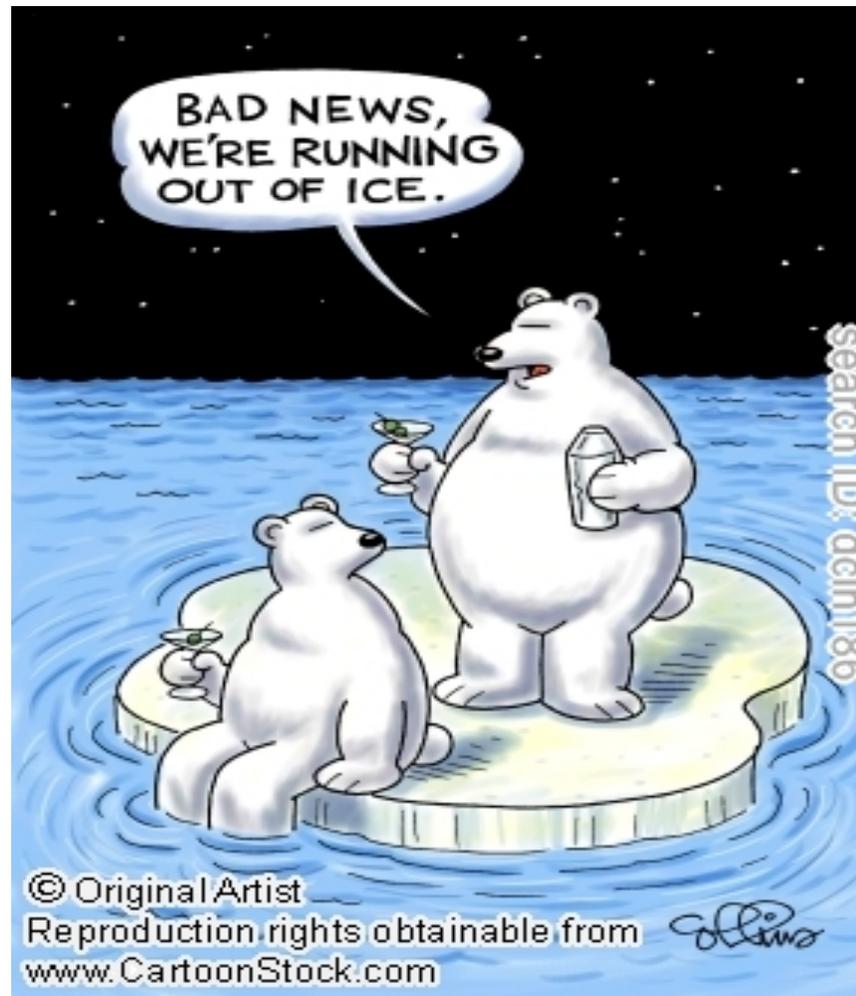
Defences – Limitation Periods

- ALGA Report 2011:
“...in most jurisdictions, legislation prescribes that litigation must be commenced within six years of the cause of action accruing (the decision, action or inaction of the council which led to the damage).”
- Limitation Act 2005 (WA)
- When cause of action accrues
- Limitation period unlikely to preclude action in negligence

Defences – Obvious risk

- ALGA Report 2011 –
“Councils may also be able to limit their exposure to liability with respect to the materialisation of an obvious risk or an inherent risk, provided sufficient information or warnings about the risk are provided.”
- Section 5O, 5N Civil Liability Act
- Definition “obvious risk”
- Whether coastal hazard risk “obvious”

So is there any good news?



Reducing risk of liability

- Use of notifications
- Indemnification conditions
- Scheme amendment
- Legislative immunity
- Refusal of application



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BARRISTERS & SOLICITORS