

SHIFTS IN VICTORIAN CLIMATE LAW AND THE PLANNING SYSTEM: INTERSECTED VIEWS FROM THE FIELD AND ACADEMIA

MARION MANIFOLD* AND BRAD JESSUP**

I INTRODUCTION

The Southern Ocean Beach House, a multi-level residential hotel resort, retail and restaurant development proposed for the site of the low-scale Southern Ocean Motor Inn in Port Campbell on the Great Ocean Road coast, will not be built. It cannot be built. Not anymore.

Despite presenting potential risks to the geological stability of a rugged and fragile coastline, which would be exacerbated by the likely effects of the sea in a changed climate, the development was ultimately approved under the *Planning and Environment Act 1987* (Vic) by the Victorian Civil and Administrative Tribunal ('VCAT', 'Tribunal'). The decision was subsequently endorsed and confirmed by the Tribunal and the local Corangamite Shire Council ('Council') as the developer was granted two permit extensions. The project was subject to six Tribunal hearings.

The fact that the development will not proceed is not an endorsement of the law. Rather, its approval and confirmation over eight years demonstrated the inability of the law to address climate change coastal risks in the first instance. It further demonstrated an unwillingness of the law to redress its faults even when planning policy concerning adaptation to climate change became explicit and as the sophistication of legal arguments within the process increased. The experience of the opposition to the development was that the law and the technicians of the law¹ needed to rethink how to deal with the risks associated with climate change on the coast. But they did not. Moreover, the law needed to accommodate the lived expertise of coastal communities and their observations about the level and nature of risk associated with changing coastal processes. The

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1 David Delaney, *The Spatial, the Legal and the Pragmatics of World-Making: Nomospheric Investigations* (Routledge, 2010) 159.

law should have acknowledged the evidence that those communities were able to conjure. In the future it must.

The development was frustrated and stalled in large part by the inability of the developer to satisfy decision-makers of its geotechnical evidence and by the vigorous opposition to the project by the Port Campbell Community Group Inc. The Group, championed by its secretary Dr Marion Manifold, used the forum of the law to ventilate the very concerns that mean that the project could not be approved again consistently with the current planning policy and law that prioritise coastal safety. Midway through her battle, Dr Manifold approached legal academic Brad Jessup to seek guidance on structuring a case around the intersection of planning law and climate law. Their collective efforts, and the unconventional relationship that developed between community advocate and academic, can be seen in the increased awareness of climate change and coastal risk throughout the long planning process for the failed development. This article presents a critique of the law through the collective experience and expertise of its two authors.

II METHODOLOGY

This article has three aspects that can collectively be considered a method. Firstly, this article offers a narrative and chronological account of the planning law conflict and planning law evolution over an approximately ten-year period until 2013. It begins with a brief overview of the proposed project and the ground of objection that became paramount. It then takes the reader through the series of cases where the project was validated contemporaneously with changes to planning law and policy that offered increasingly pertinent and clear bases upon which to reject the project. In presenting this narrative, there will be a focus on the intransigence of the law and legal technicians, the prioritisation of the status quo despite changes in context inviting a revisiting of past decisions, the dismissal of community understandings and expert observances of risk by legal technicians, and the administrative eschewal of the precautionary principle in preference for the divestment of risk management to the project proponent. The article deliberately integrates reflection and analysis.² It has been devised now that the planning permit for the redevelopment project has lapsed and there is relative certainty that it cannot be revived, thus encouraging more critical thinking by the authors, and allowing them to distil and make sense of key moments, including those that they had found disorientating.³

2 See Pip Nicholson, 'Legal Culture "Repacked": Drug Trials in Vietnam' in Penelope (Pip) Nicholson and Sarah Biddulph (eds), *Examining Practice, Interrogating Theory: Comparative Legal Studies in Asia* (Martin Nijhoff Publishers, 2008) 71, using critical reflection to understand and analyse 'legal culture'. See also Rachel Spencer, 'Holding Up the Mirror: A Theoretical and Practical Analysis of the Role of Reflection in Clinical Legal Education' (2012) 18 *International Journal of Clinical Legal Education* 181, who shows the relevance of this method to legal learning.

3 Spencer, above n 2, 194.

Secondly, this article champions a participatory action approach to resolving pressing community issues. It responds to the urging of legal scholars to consider opportunistic and appropriate methodologies for environmental law.⁴ The methodological model for the article has been drawn from an article published about the environmental justice battle against the Warren County, North Carolina hazardous waste landfill by community leader and scholar pairing Dollie Burwell and Luke W Cole.⁵ As much as the substantive aspects of this article invite a rethinking of the intersections between climate science and planning law, the method also invites a rethink about the interaction between scholarship and community advocacy. The method adopts a view that the law should attempt to achieve environmental justice in both process and outcome. It is a form of research that is both directed to social change and a recasting of the scholarly dynamic between research and research subject.⁶ The foundation of participatory action research is to ‘consider research subjects as research participants’, where ‘[k]nowledge is cocreated with, rather than extracted from, participants’.⁷ This is not a new idea. Participatory action research has been adopted by academics since at least the early 1990s.⁸ Nonetheless, this proactive method is unusual in legal writing, perhaps due to the time and complexity of law reform processes. Consequently, this article offers a novel approach to legal writing: its writers are not simply the narrators of the story, they are also some of its main characters.

One of the main characters is Dr Marion Manifold. The article is the culmination of the community advocacy work of Dr Manifold as secretary of the Port Campbell Community Group Inc over ten years opposing the redevelopment of a small coastal rural motel into a large-scale apartment and hotel complex in Port Campbell, Victoria. Her work was complemented by the legal research and legal information support provided by Brad Jessup over a shorter period during that time since mid-2006.

The third methodological aspect is that it has been written in two voices – one legal and one non-legal – to reflect the different contributions that the authors have made to shifting and recording changes in climate change coastal risk planning laws in Victoria. The contributions of each author are integrated so that the reader will frequently shift between the two perspectives. This is an unusual stylistic mechanism for legal writing. It has been carefully considered and selected to achieve a specific purpose: it seeks to acknowledge that law reform does not take place in a vacuum. Rather, law reform is frequently shaped

4 Elizabeth Fisher et al, ‘Maturity and Methodology: Starting a Debate about Environmental Law Scholarship’ (2009) 21 *Journal of Environmental Law* 213.

5 Dollie Burwell and Luke W Cole, ‘Environmental Justice Comes Full Circle: Warren County Before and After’ (2007) 1 *Golden Gate University Environmental Law Journal* 9.

6 Elisa Morgera and Louisa Parks, ‘An Inter-disciplinary Methodology for Researching Benefit-Sharing as a Norm Diffusing in Global Environmental Law’ (BENELEX Working Paper No 2, University of Edinburgh School of Law, 2014) 24–5.

7 *Ibid* 25 (emphasis altered).

8 William Foote Whyte (ed), *Participatory Action Research* (Sage Publications, 1991). More recently: Jacques M Chevalier and Daniel J Buckles, *Participatory Action Research: Theory and Methods for Engaged Inquiry* (Routledge, 2013).

and influenced by non-legal voices. For this reason, the experiences and perspectives of non-legal voices are valid sources of research and learning for the legal profession. By enabling a non-legal voice to enter the narrative, the article seeks to acknowledge, recognise and value the contribution of community members to the process of legal change.⁹ The blinkers of the legal perspective are necessarily removed by the inclusion of the second, non-legal voice.

While at times uncomfortable and unusual for the legal reader, the authors of this article consider the experience of moving between these two perspectives to be of fundamental importance to understanding the developments to the law in this field. Moreover, this story would be incomplete without contemplation of the sustained and determined efforts of Dr Manifold and the Port Campbell Community Group, which were eventually pivotal to the path of the law on this question. For this reason, Dr Manifold's own voice ought to be heard by the legal community, and is therefore given prominence in this article, alongside the analysis of legal academic, Brad Jessup. Manifold and Jessup's respective contributions are labeled and separated by in-page breaks.

The three methodological elements to this piece culminate in a hope to contribute to 'rethinking climate law'. The research is practical and integrated into the lived experiences of a local community. The stylistic mechanisms are designed such that the article speaks to and from the people affected by the legal decision-making process. The authors, in assuming these unconventional legal writing methods, intend to present a new framing with which to consider the adoption of climate change law.



III THE SOUTHERN OCEAN BEACH HOUSE AT PORT CAMPBELL, VICTORIA

Manifold: Port Campbell is a small coastal village of approximately 350 people. It is situated on Victoria's south-west coast, famous for its spectacular limestone cliffs, caverns and rock stacks, and huge Southern Ocean waves.¹⁰

Port Campbell headland has 25–30 metre high cliffs facing the Southern Ocean. There are four major visible caverns within these cliffs. Port Campbell headland is known to local Aboriginal people as Purroitchihoorong – 'the spirit voice that mocks you'¹¹ – which is believed to refer to the thunderous rumble that comes from the caverns on a big sea.

9 Cole and Foster argue that communities should speak for themselves in land use planning decisions that affect them: Luke W Cole and Sheila R Foster, *From the Ground Up: Environmental Racism and the Rise of the Environmental Justice Movement* (New York University Press, 2001) 106. See also David Schlosberg, *Defining Environmental Justice: Theories, Movements, and Nature* (Oxford University Press, 2007).

10 Western Victoria has much larger waves than elsewhere in the state: see Department of Sustainability and Environment (Vic), 'Victorian Coastal Hazard Guide' (June 2012) 37.

11 Heritage Council of Victoria, 'Port Campbell Headland & Port' (Database Report, 26 July 2008).

The Southern Ocean Beach House was a proposed four-storey, 97-apartment, 10-shop retail hotel and 200-seat restaurant. The developer intended to undertake an approximately 10 metre deep excavation, creating a footprint of approximately 6000 square metres of concrete. The proposed land for the project was near fragile cliffs and caverns on Victoria's Great Ocean Road coast in the township of Port Campbell.

To understand why the project initially raised concerns for me, I need to explain my relationship to the place. I first came to Port Campbell in 1972 as a surfer and then as a teacher. Later, I did over 500 scuba dives on the shipwrecks in the ocean offshore. I loved the cliffs and geomorphology of the place and its interaction with the sea. I could see the cliff and cavern features also replicated underwater. I didn't have an academic understanding of the geomorphology, but I did have a feel for its spectacular fragility and have seen major cliff falls where 200 metres of cliff have just collapsed catastrophically without warning.

When I looked at the scale of the proposed development, I wondered about its relationship to the fragile coast. I contacted a geotechnical expert, Russell Brown, who explained the geomorphological process of Port Campbell limestone. The headland's caverns are actually formed by groundwater running toward the sea along joints and fissures. The cracks formed thousands of years ago on a grid formation, and where the joints intersect there can be larger cavities that are prone to collapse and become sinkholes, especially when there is interference. The concrete foundation of the development, even if sat on pylons, would significantly change the natural drainage pattern. A karst expert, Dr Susan White, noted it could collapse the headland in 'tens of years'. Also, we learnt later that the effects associated with climate change, including increased sea level rises and storm surges, and changes in ocean acidification (which could potentially dissolve the limestone cliffs), needed to be considered by decision-makers.



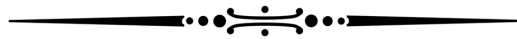
IV PLANNING APPROVAL FOR THE SOUTHERN OCEAN BEACH HOUSE

Jessup: The merits of the proposed development were first assessed by VCAT in 2003 in *Haugh v Corangamite Shire Council* ('2003 SOBH Case')¹² and then in 2005 in *Perrott Lyon Mathieson Pty Ltd v Corangamite Shire Council* ('2005 SOBH Case').¹³ In the first instance the case was preceded by the Council granting a permit for the development, which was then refused by the

12 [2003] VCAT 1692 (Members Baird and Terrill).

13 [2005] VCAT 2481 (Senior Member Baird and Member Terrill). In this case, provisional approval of the permit was confirmed subject to design alterations. In the subsequent case, *Perrott Lyon Mathieson Pty Ltd v Corangamite Shire Council* [2006] VCAT 387 (Senior Member Baird and Member Terrill) ('2006 SOBH Case'), the permit was granted after VCAT was satisfied with amended designs.

Tribunal.¹⁴ In the second instance, following a refusal by the Council of a subsequent planning permit application, VCAT granted interim approval to the development, subject to design changes. In 2006, VCAT directed the Council to issue a permit¹⁵ for the development in a hearing where the substantive matters of debate, including matters concerning climate change and coastal risk,¹⁶ were excluded.¹⁷ The three cases are a trilogy that sequentially led to the approval of a development in a form acceptable to the proponent but which ultimately proved unfeasible to it.



Manifold: In the first hearing, VCAT refused to order the permit to issue because the two wings of the buildings were considered inappropriate in design and scale and needed to be broken into smaller modules. A modified plan was submitted by the developer to Council in 2004, which had the same footprint, excavation, and number of rooms and shops, but was reconfigured into pods on a large podium. That design was the subject of the second case. In the third case, the focus was on trivial matters including design aesthetic, roof colours, and window glazing.



Jessup: The focus of the first hearing was on the size of the development on the site rather than the external impacts it may have had.¹⁸ The Victorian Department of Sustainability and Environment, for instance, argued that it would ‘create a visual impact that would be inconsistent with the township character and values of the coast and National Park’.¹⁹ This agency, with bureaucratic control over the Victorian Coastal Strategy, deployed the strategy as a basis for opposition by reference to the design and siting guidelines about appropriate development for coastal locations. It was Dr Manifold who raised the argument that the development would have adverse geotechnical consequences and that the development would not be supported by the geomorphologic conditions of the site.²⁰

While the Tribunal listed five broad key matters for resolution in the *2003 SOBH Case*,²¹ the focus of the Tribunal members was firmly on the architectural merits of the proposed development. The Tribunal dismissed objector concerns

14 The review was initiated by objectors to the development under the *Planning and Environment Act 1987* (Vic) s 82 and on behalf of the developer against conditions imposed in the proposed permit under s 80.

15 In accordance with the *Planning and Environment Act 1987* (Vic) s 86.

16 See Andrew Macintosh, ‘Coastal Climate Hazards and Urban Planning: How Planning Responses Can Lead to Maladaptation’ (2013) 18 *Mitigation and Adaptation Strategies for Global Change* 1035, which provides a survey of literature on coastal hazards and its intersection with planning.

17 *2006 SOBH Case* [2006] VCAT 387, [2].

18 *2003 SOBH Case* [2003] VCAT 1692, [34].

19 *Ibid* [35].

20 *Ibid* [37].

21 *Ibid* [41].

about loss of amenity, traffic, parking impacts on a working port, overlooking, overshadowing and loss of views.²² Perplexingly, the Tribunal concluded that it could not use permit conditions to achieve a greater architectural and contextually sensitive design, but it could employ permit conditions with respect to geological risks. It was these geological risks that if taken seriously could, and ultimately did, make the project entirely unfeasible. With respect to the proposed architectural design of the building, the Tribunal stated:

We are also not persuaded that the outcome that would potentially result from the adoption of the Council's Condition 1(a) is acceptable. ... [W]e have already said that the proposal fails to achieve an adequate degree of articulation in both the building massing and roof form and a much more detailed architectural response is necessary to break down the visual bulk that will be inevitable given the size and prominence of the review site.²³

The Tribunal only dealt briefly with the issue of geotechnical risk. It foreshadowed the postponement of further investigations, and at least implicitly conceded the existence of danger by referencing the change in route of the Great Ocean Road:

We understand that issues associated with the retreat of the coastline and sea caverns have contributed to the decision to re-route the Great Ocean Road. We accept the fragility of the land and the need for care given sub-structure conditions. We are, however, satisfied that geo-technical investigations could be undertaken prior to a development commencing to address risks and identify the necessary construction techniques, including those associated with groundwater management, foundations and retaining structures.²⁴

The second case brought to the Tribunal followed the same pattern as the first. The same Tribunal members referenced their past decision²⁵ and noted an unwillingness to reach a different outcome unless significant changes to the proposal, context or planning policy or law were presented to it.²⁶ As noted below, the members were not alive to the development of relevant climate law. The focus the Tribunal put on clause 15.08 of the planning scheme, dealing with coastal protection, was one that allowed it to avoid addressing environmental risks, rather than grappling with them and the evidence about those risks. In neither instance did the Tribunal reference the precautionary principle, climate change or climate-related risks. It did not engage with the expert evidence provided by Dr Manifold about coastal risks.

22 Ibid [71] ff. The policy bases for these concerns are outlined in Minister for Planning (Vic), *Victoria Planning Provisions*, Amendment VC19, 24 July 2003, cl 54.04 (Particular Provisions). A note on citations: Historical versions of the *Victoria Planning Provisions* are available at Environment, Land, Water and Planning (Vic), *Victoria Planning Provisions Planning Scheme* (7 July 2016) Planning Schemes Online <<http://planning-schemes.delwp.vic.gov.au/planning-scheme-histories/planning-scheme-history-index/amazon-remote-content-pages/Victoria-Planning-Provisions>>. The most recent version of the *Provisions* at the time of the relevant decision has been cited throughout. The reference to the VC Amendment number has been included in the citation to help readers navigate to the *Provisions* at the relevant point in time.

23 *2003 SOBH Case* [2003] VCAT 1692, [68].

24 Ibid [87].

25 See, eg, *2005 SOBH Case* [2005] VCAT 2481, [27].

26 Ibid [22]–[23].



Manifold: The VCAT decisions seem to have ignored State and local planning policies and coastal risk. The community was amazed that the Tribunal wrote that a high density proposal on a fragile coastal headland met the requirements of the local urban design policy for the town for low-scale development to ‘[p]rotect ... the low scale coastal character’ and promote the village character.²⁷ The Tribunal found support for the project in the Victorian Coastal Strategy 2002²⁸ and the Great Ocean Road Region Strategy 2004.²⁹ But these policies recommended a hierarchical function of coastal towns: that coastal villages retain their ‘village character’ and larger tourist facilities be directed to regional centres. These policies were supposed to protect our town and coastline.

VCAT also dismissed the geotechnical evidence provided to them by Mr Brown, the VicRoads geotechnical expert of over 18 years who had done all the risk assessments along the Great Ocean Road, including a detailed risk assessment of the Port Campbell headland.

We didn’t explicitly raise climate change as a basis of objection at this stage. Although we read planning policies extensively, we didn’t know that climate change was applied yet in planning law. This shows the problems community groups face when trying to work through the planning law system.



Jessup: In the *2005 SOBH Case*, the Tribunal members proceeded on the basis that coastal risks are not the domain of planning law officials, notwithstanding the reference to such risks in planning policies. Instead they treated them as matters to be addressed by project developers. In response to the arguments raised by Dr Manifold and the expert evidence she provided, they concluded:

It is self evident that the coastline is fragile and volatile, demonstrated through major and minor incidents and subsidence that have occurred in recent years. The fragility of the locale is well known and it is incumbent on the proponent to satisfy itself and the necessary building regulations that the proposed development can be properly secured and engineered. That is not a matter that we need to resolve in this planning permit process although we accept the notion put forward in the Council’s draft conditions of a geotechnical report being submitted.

The details of such a geotechnical investigation are not required to be satisfied ahead of a permit issuing for the use and development of the land, as had been suggested in some submissions.

We remain of the view that geo-technical investigations should be undertaken prior to a development commencing to address risks and identify the necessary construction techniques, including those associated with groundwater management, foundations and retaining structures.

27 Chris Dance Land Design, *Port Campbell Urban Design Framework* (Shire of Corangamite, March 2002) 13, 29, 35.

28 Victorian Coastal Council, ‘Victorian Coastal Strategy 2002’ (Government Strategy, January 2002).

29 Department of Sustainability and Environment (Vic), ‘Great Ocean Road Region: Towards a Vision for the Future: A Land Use and Transport Strategy 2004’ (Government Strategy, August 2004).

Mr Brown's evidence included remarks about the impact of the development on the coastline and his belief that an environmental effects statement should be prepared. We are not persuaded to this view. We have not been presented with evidence or material of any kind to persuade us that the proposal would impact on the coast other than the visual impact we have assessed above. The coastline will remain active and that may create risks. It is a situation to be monitored but not one, on the information before us, to warrant rejection of the application ...³⁰

This approach of divesting risk management to project proponents through the use of development approval conditions is fraught, particularly because there is very little supervision of compliance with these conditions. Nevertheless, the choice of decision-makers in environmental law to manage environmental risks this way – through the use of conditions – was confirmed by the Federal Court in a later case.³¹ What was distinct in that later case compared to the present one, however, was that the project proponent presented evidence about risk. Tracey J, in an awkward application of the precautionary principle and scientific uncertainty,³² noted that there was some certainty from the proponent's evidence that risks could be prevented or mitigated through conditions. By contrast, in the *2005 SOBH Case*, the only party to present evidence about geotechnical or coastal risk was Dr Manifold.³³ The developer was mute on risk. Yet, when directing the Council to issue a permit in the *2006 SOBH Case*, the Tribunal attached a 'geotechnical condition' delaying the determination of the feasibility of the project:

Prior to any development commencing a further detailed geotechnical assessment shall be undertaken on the site in accordance with and based on the initial findings and recommendations made by Provincial Geotechnical Pty Ltd in their report dated October, 2002. Such assessment shall be submitted to the Responsible Authority for approval and endorsement prior to the commencement of construction.³⁴

The required evaluation did not have an assurance of openness and transparency, keeping the local community uncertain about the prospect of the development.



Manifold: Until the permit finally lapsed we would write to Council every month asking if a geotechnical report had been submitted. We realised Council did not have experts in this area and wanted to ensure that any report was perused by experts.



30 *2005 SOBH Case* [2005] VCAT 2481, [84]–[87].

31 *Lawyers for Forests Inc v Minister for the Environment, Heritage and the Arts* (2009) 165 LGERA 203.

32 *Ibid* 220–1 [39]–[40].

33 *2005 SOBH Case* [2005] VCAT 2481, (Appearances). In the 2003 case the proponent did not call, but presented a report by, a geotechnical engineer. See *2003 SOBH Case* [2003] VCAT 1692, (Appearances).

34 *2006 SOBH Case* [2006] VCAT 387, [9] (Order).

V EARLY PLANNING POLICY FOR CLIMATE AND COASTAL RISK PRESENT BUT OVERLOOKED

Jessup: The three cases that led to the grant of the planning permit for the Southern Ocean Beach House occurred contemporaneously with the emerging awareness of climate change in planning law in Australia. The Tribunal members, with expertise in planning law and sitting within the Planning and Environment List of VCAT, would not have been able to avoid that development. The president of VCAT was influential in entrenching climate change concerns within Victorian planning law in 2004.³⁵ In the case concerning the role of a planning panel with responsibility to assess a planning scheme amendment that would support the expansion and ongoing operation of coal-fired electricity generation, Morris J confirmed that climate change considerations would be relevant and could not be ignored unless demonstrably irrelevant to the matter before the decision-maker.³⁶ Where there is a ‘nexus’ between a proposal and climate-related impacts, even where the proposal might not have a direct adverse impact on the climate – in the *Latrobe Case* the planning instrument was directed towards roads and flooding³⁷ – the planning decision-maker has an obligation to consider the adverse effects of climate change. This obligation is particularly relevant where the proposal would make climate-related impacts more likely.³⁸

In the *Latrobe Case*, it was the parties who raised and argued about the relevance of climate change matters to the proceeding. In the cases leading up to the grant of the permit for the Southern Ocean Beach House, there was no clear or explicit articulation of the relationship between the coastal and geological risks argued by Dr Manifold and climate change-related risks. The concern was how the development would increase so-called ‘natural’ risks of cliff and cavern collapse through excavation and the development foundation. The Tribunal was not asked to consider how changes to ‘natural’ processes brought about through climate change might increase or exacerbate these risks.

This climate-related risk, however, was explicit in planning documents, notably the 2002 Victorian Coastal Strategy, which was cited and used to support the development by the Tribunal in both the *2003 SOBH Case*³⁹ and the *2005 SOBH Case*.⁴⁰ The Tribunal engaged with the strategy at a high level of detail, extracting guidance about Port Campbell being a tourism node in order to support the nature, general location and size of the hotel development.⁴¹ It was also used to develop a strategic position to support development at the township level. Yet, the strategy was ultimately overlooked at the finer-grain scale of the particular

35 *Australian Conservation Foundation v Latrobe City Council* (2004) 140 LGERA 100 (*‘Latrobe Case’*). See Brian J Preston, ‘The Influence of Climate Change Litigation on Governments and the Private Sector’ (2011) 2 *Climate Law* 485, who notes the significance of this decision in the development of climate conscious planning law in Australia.

36 *Latrobe Case* (2004) 140 LGERA 100, 106 [26]–[27].

37 *Ibid* 109–110 [45]–[46].

38 *Ibid* 109 [45], 110 [47].

39 *2003 SOBH Case* [2003] VCAT 1692, [31].

40 *2005 SOBH Case* [2005] VCAT 2481, [20].

41 *2003 SOBH Case* [2003] VCAT 1692, [47]; *2005 SOBH Case* [2005] VCAT 2481, [27].

site even though the Department of Sustainability and Environment initially,⁴² and the Council secondly,⁴³ expressed location-based reservations about the project. Moreover, the overwhelming nature of the objections from the community groups involved were specific to the site of development.

Glaringly absent from the decision was the unambiguous statement within the 2002 Victorian Coastal Strategy that climate change was then a pressing policy concern:

Probably the most significant dynamic element that needs to be managed in the coastal environment in the future is climate change. The best science now tells us that we can expect climate change ‘with certainty’, and that sea level change and changing weather conditions will have the most significant impact on coastal planning and management. Enhanced coastal erosion by storm events and changed weather patterns is a likely outcome that we will need to plan for and manage over the coming years.

Direct impacts are likely to be increased and altered patterns of erosion of beach and dune systems, undercutting of cliffed coasts, increased peak flows in coastal rivers and estuaries and damage to coastal infrastructure like piers, jetties, bathing boxes, breakwaters, sea walls and coastal roads. Damage to coastal structures will heighten safety concerns and the risk situation for managers and insurers will intensify. ...

The naturally dynamic nature of the coastal environment has meant that it has always been important that decisions impacting on the future coastal environment be made with caution.⁴⁴

The relevant planning law had also begun to evolve policies with respect to coastal development in a time of climate-related risk. There were requirements that ‘[p]lanning authorities must have regard to’,⁴⁵ and later that ‘planning for coastal areas should be consistent with’, the Victorian Coastal Strategy.⁴⁶ When the Tribunal was making its preliminary and subsequent decisions about whether and on what conditions the development should be permitted, the ‘hierarchy of principles for coastal planning and management’ outlined in the Victorian Coastal Strategy⁴⁷ had been incorporated as a decision-making matrix into Victorian planning law.⁴⁸ Like the Victorian Coastal Strategy more generally, Victorian planning law provided that ‘[d]ecision-making by planning authorities and responsible authorities should be consistent with’ the hierarchy, which

42 2003 *SOBH Case* [2003] VCAT 1692, [35].

43 2005 *SOBH Case* [2005] VCAT 2481, [46]–[47].

44 Victorian Coastal Council, ‘Victorian Coastal Strategy 2002’, above n 28, 11.

45 Minister for Planning (Vic), *Victoria Planning Provisions*, Amendment VC17, 24 December 2002, cl 15.08-3 (State Planning Policy Framework), which was the law throughout the State at the time the Council made its decision.

46 See Minister for Planning (Vic), *Victoria Planning Provisions*, Amendment VC19, 24 July 2003, cl 15.08-3 (State Planning Policy Framework) and Minister for Planning (Vic), *Victoria Planning Provisions*, Amendment VC34, 22 September 2005, cl 15.08-3 (State Planning Policy Framework), which was the law throughout the State at the times when the Tribunal made its decisions in the 2003 *SOBH Case* and 2005 *SOBH Case*. There was no change in the relevant planning provisions between the 2005 *SOBH Case* and the 2006 *SOBH Case*.

47 Victorian Coastal Council, ‘Victorian Coastal Strategy 2002’, above n 28, 20.

48 See Minister for Planning (Vic), *Victoria Planning Provisions*, Amendment VC19, 24 July 2003, cl 15.08-2 (State Planning Policy Framework) and Minister for Planning (Vic), *Victoria Planning Provisions*, Amendment VC34, 22 September 2005, cl 15.08-2 (State Planning Policy Framework).

prioritises first ‘the protection of significant environmental features’, secondly ‘the sustainable use of natural coastal resources’, thirdly ‘integrated planning’ and finally, and only upon meeting the first three principles, facilitating ‘suitable development on the coast within existing modified and resilient environments’.⁴⁹ This hierarchy, however, was not referenced by the Tribunal in either instance.

Also overlooked was the exhortation in the Victorian Coastal Strategy to apply the precautionary principle to coastal decisions facing uncertain risks.⁵⁰ This principle was situated within the decision-making matrix through clause 15 of the State Planning Policy Framework,⁵¹ but also introduced into planning policy through clause 11.⁵² The latter clause referenced national policies on ecologically sustainable development and included the planning objectives of employing ‘a best practice environmental management and risk management approach which aims to avoid or minimise environmental degradation and hazards’.⁵³ Within a climate change context the precautionary principle had been identified as a relevant planning principle since at least 1994, when Pearlman CJ of the New South Wales Land and Environment Court recognised that caution should be exercised when evaluating projects where there is uncertainty about the effects of increased greenhouse gas emissions.⁵⁴

One notable planning law and policy change between the two substantial Tribunal decisions in the *2003 SOBH Case* and the *2005 SOBH Case* was the inclusion of law and policy concerning the Great Ocean Road Region, where the proposed development would be located. This change was noted by the Tribunal in the *2005 SOBH Case*.⁵⁵ The Tribunal conceded that this policy was a change that created a potential difficulty in approving the development in a small town like Port Campbell.⁵⁶ Still, the Tribunal approved the development, believing that

49 Ibid.

50 The 2002 Victorian Coastal Strategy provided that ‘[w]here there are threats of serious or irreversible environmental damage, lack of full scientific certainty should not be used as a reason for postponing measures to prevent environmental degradation’: Victorian Coastal Council, ‘Victorian Coastal Strategy 2002’, above n 28, 21.

51 Minister for Planning (Vic), *Victoria Planning Provisions*, Amendment VC19, 24 July 2003, cl 15.08-2 (State Planning Policy Framework); Minister for Planning (Vic), *Victoria Planning Provisions*, Amendment VC34, 22 September 2005, cl 15.08-2 (State Planning Policy Framework).

52 Minister for Planning (Vic), *Victoria Planning Provisions*, Amendment VC19, 24 July 2003, cl 11 (State Planning Policy Framework); Minister for Planning (Vic), *Victoria Planning Provisions*, Amendment VC34, 22 September 2005, cl 11 (State Planning Policy Framework).

53 Minister for Planning (Vic), *Victoria Planning Provisions*, Amendment VC16, 8 October 2002, cl 11.03-2 (State Planning Policy Framework); Minister for Planning (Vic), *Victoria Planning Provisions*, Amendment VC19, 24 July 2003, cl 11.03-2 (State Planning Policy Framework).

54 *Greenpeace Australia Ltd v Redbank Power Co Pty Ltd* (1994) 86 LGERA 143 (*‘Redbank’*). In *Redbank*, the issue was the extent to which the project would increase greenhouse gas emissions so as to exacerbate climate change effects, rather than being a case concerning a project likely to be affected by climate change, as was the situation presented to the Tribunal members in the *2003 SOBH Case* and the *2005 SOBH Case*.

55 *2005 SOBH Case* [2005] VCAT 2481, [39]:

It is noteworthy that since the previous Application that the Great Ocean Road Strategy is now referenced at Clause 15.08 of the Scheme. We have considered whether that steers a significant or subtle change direction that should cause us to conclude differently in relation to a large hotel ...

56 Especially referencing Strategy 4.3 dealing with ‘significant tourist facilities’ in the Great Ocean Road Strategy: *ibid*.

there were no other planning strategies presenting obstacles to an approval.⁵⁷ In so doing, the Tribunal leapt straight to the policy document referenced in the planning law, again overlooking the nuanced but significant legal change⁵⁸ brought about in the interim period between Tribunal decisions. Specifically the Tribunal did not respond to the inclusions into clause 15.08-3 of the revised State Planning Policy Framework which stated that planning in the Great Ocean Road Region should encourage ‘[u]sing natural resources with care’⁵⁹ and a direction to decision-makers to be mindful of the peculiarities of the landscape of the proposed development.⁶⁰

For the 2005 and 2006 cases the planning law directed the Tribunal that:

Planning for the Great Ocean Road Region should:

Protect the landscape and environment by:

- Protecting public land and parks and identified significant landscapes.
- Ensuring development responds to the identified landscape character of the area.
- Managing the impact of development on catchments and coastal areas.
- Managing the impact of development on the environmental and cultural values of the area.⁶¹



Manifold: The particular features and characteristics of Port Campbell were never really acknowledged: from its village setting to the ferocious waves or hazardous coastline. Studies were being undertaken⁶² about Port Campbell that the Tribunal did not consider to be important. In the 2005 case, I presented to the Tribunal a public speech of VCAT’s President of the time, Morris J,⁶³ who referred to the Tribunal’s determination to refuse a permit for this proposed development as the Tribunal believed it was important to retain Port Campbell’s

57 2005 *SOBH Case* [2005] VCAT 2481, [39]–[42].

58 Minister for Planning (Vic), *Victoria Planning Provisions*, Amendment VC34, 22 September 2005, cl 15.08-3 (State Planning Policy Framework). Significant amendments to the State Planning Policy Framework were gazetted on 23 December 2004: see Acting Deputy Secretary, Built Environment, Department of Sustainability and Environment (Vic), ‘Victorian Planning Provisions: Notice of Approval of Amendment: Amendment VC32’ in Victoria, *Victoria Government Gazette: General*, No G 52, 23 December 2004, 3521.

59 Minister for Planning (Vic), *Victoria Planning Provisions*, Amendment VC34, 22 September 2005, cl 15.08-3 (State Planning Policy Framework).

60 *Ibid.*

61 *Ibid.*

62 In the 2005 *SOBH Case*, Dr Manifold alerted the Tribunal to the Coastal Spaces Inception Report, under preparation by the Victorian Government’s Victorian Coastal Council, the agency responsible for the Victorian Coastal Strategy, in response to which the Tribunal noted ‘[w]e have considered that material but as a study that is yet to be finalised and adopted it cannot carry any influential weight’: [2005] VCAT 2481, [45].

63 Justice Stuart Morris, ‘Destination Maker or Destination Breaker: The Role of the Victorian Civil and Administrative Tribunal’ (Paper presented at Victorian Tourism Conference 2004, Melbourne, 23 March 2004) 10.

low-scale character. The Tribunal seemed amused at the effort I had put into locating and presenting that material.

My views counted for little. I had taken part in ten council planning consultancies across 20 years to determine a vision and planning policy for Port Campbell. Through those community processes it was recognised that Port Campbell's low scale makes it a special place, and that the coast was highly significant⁶⁴ and fragile. The Council's policies noted the coast is of 'international significance',⁶⁵ and the Great Ocean Road Region Landscape Assessment Study in 2003⁶⁶ and the Coastal Spaces Landscape Assessment Study in 2006 stated this coast is of 'national significance' and should be protected.⁶⁷ I tried to raise these matters. The Tribunal was ultimately disinterested.

VI AN UNWILLINGNESS TO ENGAGE WITH COASTAL CLIMATE RISK IN PLANNING DECISIONS FOR THE SOUTHERN OCEAN BEACH HOUSE

After the VCAT decision to approve the development of the Southern Ocean Beach House, I realised that we needed to get more help to try to highlight the problems presented by the development. My concerns were on the scale of the development, the use of public land to facilitate the development and the geotechnical risk of the development. I was looking for expert help to try to stop the development. We felt that the Tribunal was not taking notice of local community views or expertise. Our group also increased its activity in trying to raise the local concerns of the project and in particular to get someone to take seriously the geomorphological risks associated with the development's impact on the caverns and cliffs.

Our group made many submissions and offered the Port Campbell development as a case study example to various government processes and bodies including: the Victorian Environmental Assessment Council; the Inquiry into the Environment Effects Statement Process; Coastal Climate Change Advisory Committee; Planning and Environment Act Review; Parliamentary Select Committee on Public Land Development; Heritage Victoria; the Victorian Future Coasts Program; Federal Government – Meeting the Challenge of Coastal Growth; and Risk to Bandicoots to the Environment Protection and Biodiversity Conservation ('EPBC') Federal Department. We have received many grants for environmental works on the headland and a \$25,000 Coastcare Victoria grant to

64 Victorian Coastal Council, 'Coastal Spaces Landscape Assessment Study' (State Overview Report, Department of Sustainability and Environment (Vic), September 2006) 68.

65 Minister for Planning (Vic), *Corangamite Planning Scheme*, Amendment NPS1, 9 September 1999, cl 21.03-1 (Map) (Municipal Strategic Statement).

66 Planisphere, 'The Great Ocean Road Region Landscape Assessment Study – Precinct Package Precinct 3.1 – Port Campbell Coast and Hinterland' (Report, September 2003) 2. Emerging from this study, the Victorian Government developed strategies to assist councils 'to provide a higher level of protection for significant areas through council planning schemes': Department of Sustainability and Environment (Vic), 'Land Use and Transport Strategy 2004', above n 29, 13.

67 Victorian Coastal Council, 'Coastal Spaces Landscape Assessment Study', above n 64, 68.

raise awareness on the endangered Southern Brown Bandicoot which we monitor using remote cameras for the Biodiversity Atlas.



Jessup: In November 2007, a Parliamentary Select Committee on Public Land Development was established for the purpose of investigating the loss of public land to commercial development.⁶⁸ Within its remit it considered the 2003 development of Crown land for the Southern Ocean Beach House's use. Specifically, the Committee considered the development's need to acquire more Crown land near the caverns for its porte-cochère. Parliamentary Committees adopt an informal, round table, inquisitorial approach to eliciting evidence and opinion about the topics of inquiry. Members of the Port Campbell Community Group provided written submissions⁶⁹ and were invited to appear to present their concerns.⁷⁰



Manifold: The relevance of the public land on the headland to the development was always known to us. On the second day of the first VCAT hearing, we learnt from the Tribunal that the Great Ocean Road on the Port Campbell headland had been closed due to the high risk of cavern collapse. At the time we thought its closure was triggered by the Council reading the expert geotechnical report prepared by Russell Brown that we submitted to VCAT, in which he outlined his VicRoads testing and the risks. We knew that this was a hasty road closure and the community had not been consulted. Using Freedom of Information requests we discovered that VicRoads had advised Council to close the road in 1993. However, Council had kept the road open until now, when they closed it. The Southern Ocean Beach House development was dependent on the development of a large roundabout on coastal Crown land for its entry and egress. There was no geotechnical test to ensure that cavities didn't exist under this roundabout.

It was this failure in process that we brought to the attention of the Parliamentary Select Committee and our concerns that highly sensitive Crown land had been permitted to be developed to accommodate an over-scaled private development. What's more, additional public land would be needed. The Committee, however, became very interested in the whole project and its impacts.

The Committee raised concerns about the proposed development's visual impact, the lack of cultural, social and heritage assessment, the fragility of the headland, and the risk of the development to public safety.⁷¹

68 Select Committee of the Legislative Council on Public Land Development, Parliament of Victoria, *Final Report* (2008) 19.

69 *Ibid* 159, 162.

70 *Ibid* 164.

71 *Ibid* 138–42.

After hearing evidence from the community, from experts, and through the conduct of its own research, the Committee wrote about our efforts in opposition to the Southern Ocean Beach House development:

the local community has expressed frustration and concern over the Victorian Government's reluctance to intervene in the process to ensure any development has minimal impact upon public risk and on the stability of the internationally significant coastline. ...

The Committee also expresses concern at the refusal of the Government to provide input into this issue during the course of the Inquiry. The Committee invited the Department of Sustainability and Environment to give evidence at the Port Campbell hearings, however the invitation was declined. At a hearing on 19 November, the Committee further attempted to obtain the Department's assessment of the proposed Port Campbell development. However, the Secretary of the Department declined to provide advice on this matter as he believed the issue was outside the Government's interpretation of the terms of reference.⁷²

The Parliamentary Select Committee Inquiry reached its independent finding that: 'The proposed development of the Southern Ocean Beach House will have significant visual impacts and may have serious geological stability and public safety impacts on the surrounding area'.⁷³ It recommended '[t]hat the Government notify the relevant authorities that the development of the Southern Ocean Beach House not proceed until the geological assessments are complete'.⁷⁴

On reading the Committee's report our group was relieved that our concerns were finally taken seriously, as the risks were well founded on extensive expert reports.

As well as taking part in the Committee process, I spoke to coastal geomorphologists, engineers, and hydrogeologists, the National Trust, the Western Coastal Board, Australian Conservation Foundation, Victorian National Parks Association, Environment Victoria, Friends of the Earth, Protectors of Public Lands Victoria Inc, researchers on marine and coastal processes and protection, landscape consultants, historical societies, heritage architects and anthropologists, fishing and boating enthusiasts and industry groups. We wrote to members of Parliament, urging them to intervene. We petitioned Parliament asking them to stop the grant of Crown land for the development.

It felt as though we were making headway. Members of Parliament started asking questions about the development, concern was expressed about the location and scale of development and there was a common reservation among geo-specialists about the impacts of the development on the headland's stability. If the headland collapsed, it could open up much of the Port Campbell township to the risk of sea attack.

One approach recommended by geotechnical expert, Russell Brown, at the Tribunal was to undertake an Environment Effects Statement on the project.⁷⁵ In April 2006, I spoke to Brad Jessup, who I found by searching for experts in Victoria on the Environment Effects Statement process, about this option and the

72 Ibid 140.

73 Ibid 16 (Finding 5.15).

74 Ibid 17 (Recommendation 5.16).

75 Under the *Environment Effects Act 1978* (Vic).

possibility of raising the matter with the Minister for Planning to intervene. We spoke about the need for consent to use coastal Crown land, the role of the federal government under the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) to ensure that the endangered bandicoots on the headland were not further endangered by the development, and the avenues to access the Tribunal again. And we started to talk about climate change in planning law.

VII A RENEWED FOCUS ON CLIMATE CHANGE LAW AND POLICY

Two years after the 2006 Tribunal decision, the developer had not started the project and was required to apply for an extension of time to the planning permit. By this time, a key focus of our argument opposing the ongoing approval of the development was on the climate change exacerbated risks to the development (and by the development) to the headland's stability. Brad produced a document for us that summarised the change of planning policy and law and explaining cases in Victoria and New South Wales that had found the need to act in a cautionary way in planning law when faced with climate change risks.



Jessup: Climate change law had been developing between 2006 and 2007. If the 2004 *Latrobe Case*⁷⁶ was a starting point for climate change planning law in Australia as articulated earlier, the decision of Pain J of the New South Wales Land and Environment Court in *Gray v Minister for Planning*,⁷⁷ saw the 'rise'⁷⁸ of a 'new' climate law⁷⁹ in Australia that intersected with planning and environmental assessment laws. Moreover, this legal development occurred in the context of the newly elected Rudd Government, Australia's ratification of the Kyoto Protocol, and planning for an emissions trading scheme.⁸⁰ Australian law was beginning to reflect a more active approach to managing and reacting to climate change. The new planning and environment law was a climate law fashioned around the long established principles of precaution and ecologically sustainable development.⁸¹ These principles were relevant to the decisions of VCAT to approve the planning permit for the Southern Ocean Beach House. The

76 (2004) 140 LGERA 100.

77 (2006) 152 LGERA 258 ('*Gray*').

78 Anna Rose, '*Gray v Minister for Planning: The Rising Tide, of Climate Change Litigation in Australia*' (2007) 29 *Sydney Law Review* 725.

79 Tim Bonyhady, 'The New Australian Climate Law' in Tim Bonyhady and Peter Christoff (eds), *Climate Law in Australia* (Federation Press, 2007) 8.

80 We are grateful to an anonymous reviewer for this point. For a discussion of the broader legal and policy responses to climate change in Australia at this time, see Nicola Durrant, *Legal Responses to Climate Change* (Federation Press, 2010).

81 Rose, above n 78, 727–8.

new climate law stood as a stark counterpoint⁸² to the manner in which climate science and risk were considered by Dowsett J in the 2006 judgment⁸³ concerning the federal environmental law approval process for two Queensland coal mines.

In *Gray*,⁸⁴ Pain J decided that in the context of an environmental assessment, especially where there exists a regulatory direction to consider the concept of ecologically sustainable development and the precautionary principle,⁸⁵ an assessment of the whole climate change contribution of a project must be undertaken and considered.⁸⁶ It was a decision that has logical connections with the earlier climate cases of *Latrobe*⁸⁷ and *Redbank*.⁸⁸ Climate change and greenhouse gas emissions are not simply relevant, as was concluded in the 2004 *Latrobe* case,⁸⁹ but ought to be evaluated. Following on from the 1994 case of *Redbank*,⁹⁰ Pain J's decision shows that the precautionary principle can be used to deny a project approval where evidence has not been presented about the possible extent of climate associated risk.

The development project involved in the SOBH cases, which is the subject of this article, was of a different character to these coal-mining cases. Regardless, there is comparability concerning risk, evidence, relevance and precaution across the case law. It would not have been a leap to apply the same type of reasoning to the decisions about the Southern Ocean Beach House in light of the planning law and policy of the time, especially with the priority placed on climate change in the 2002 Victorian Coastal Strategy, as noted above. This was confirmed in changes to planning law and policy from 2007 and through two 'landmark' planning law coastal adaptation cases in Victoria and New South Wales in 2007 and 2008.⁹¹

In November 2007, the Land and Environment Court of New South Wales decided the case of *Walker v Minister for Planning*.⁹² In that case, similar to the leading decisions beforehand, Biscoe J confirmed that the application of the principle of ecologically sustainable development and the precautionary principle⁹³ included a requirement to consider the climate change risks associated with coastal developments.⁹⁴ In that case the controversial development was a large scale residential and retirement village on low-lying coastal land. Similarly,

82 Ibid 731.

83 *Wildlife Preservation Society of Queensland Proserpine/Whitsunday Branch Inc v Minister for the Environment and Heritage* (2006) 232 ALR 510.

84 (2006) 152 LGERA 258.

85 Ibid 291 [115], 295–7 [131]–[135].

86 Ibid 294 [124]–[126].

87 (2004) 140 LGERA 100.

88 (1994) 86 LGERA 143.

89 (2004) 140 LGERA 100, 106 [26]–[27].

90 (1994) 86 LGERA 143, 154.

91 Jacqueline Peel and Lee Godden, 'Planning for Adaptation to Climate Change: Landmark Cases from Australia' (2009) 9(2) *Sustainable Development Law & Policy* 37.

92 (2007) 157 LGERA 124. Successfully appealed in *Minister for Planning v Walker* (2008) 161 LGERA 423, though the finding about climate change risk being an integral part of ecologically sustainable development was not disturbed.

93 *Walker v Minister for Planning* (2007) 157 LGERA 124, 191 [163].

94 Ibid 192 [166].

the 2008 VCAT *Gippsland Coastal Board* decision⁹⁵ dealt with a proposed subdivision and development of low-lying land. The Tribunal refused a permit to the developer because of the application of the precautionary principle. This principle, drawn from clause 15.08 of the State Planning Policy Framework was applied, with the Tribunal stating: ‘We consider that increases in the severity of storm events coupled with rising sea levels create a reasonably foreseeable risk of inundation of the subject land and the proposed dwellings, which is unacceptable’.⁹⁶

Together these two cases represented for Peel and Godden that ‘[t]he potential for residential and other coastal development to be adversely affected by climate change has important ramifications for the associated responsibilities of planning authorities, which act as “the stewards of the coast”’.⁹⁷ This was an importance expressed emphatically in the revised version of the Victorian Coastal Strategy. In draft and consultation format from 2007,⁹⁸ the 2008 Victorian Coastal Strategy identified that the first coastal issue requiring specific attention was ‘climate change’.⁹⁹ The Strategy explained that: ‘It is the combined effects of sea level rise, the impact of tides, storm surges, wave processes and local conditions such as topography, elevation and geology that will produce climate change impacts and risks in coastal areas’.¹⁰⁰ It specified the following relevant policy:

- 2 Apply the precautionary principle to planning and management decision-making when considering the risks associated with climate change.
- 3 Prioritise the planning and management responses and adaptation strategies to vulnerable areas, such as protect, redesign, rebuild, elevate, relocate and retreat.
- 4 Ensure that new development is located and designed so that it can be appropriately protected from climate change’s risks and impacts and coastal hazards such as:
 - inundation by storm tides or combined storm tides and stormwater (both river and coastal inundation)
 - geotechnical risk (landslide)
 - coastal erosion
 - sand drift.¹⁰¹

Within planning law, in the State Planning Policy Framework, these policies became entrenched and hence influential in the *Gippsland Coastal Board* decision. From September 2007, clause 15.08-2 of the State Planning Policy

95 *Gippsland Coastal Board v South Gippsland Shire Council [No 2]* [2008] VCAT 1545 (Deputy President Gibson and Member Potts) (*‘Gippsland Coastal Board’*).

96 *Ibid* [48].

97 Peel and Godden, above n 91, 37, citing Meg Caldwell and Craig Holt Segall, ‘No Day at the Beach: Sea Level Rise, Ecosystem Loss, and Public Access along the California Coast’ (2007) 34 *Ecology Law Quarterly* 533, 535. See Justine Bell, *Climate Change and Coastal Development Law in Australia* (Federation Press, 2014), who explores in detail responsibilities, options and potential liabilities of local authorities in the context of coastal developments in a changed climate.

98 Victorian Coastal Council, ‘Victorian Coastal Strategy 2008’ (Government Strategy, 2008) 6.

99 *Ibid* 12.

100 *Ibid* 13.

101 *Ibid* 38.

Framework contained a direction that: ‘Planning for coastal areas should: ... Identify and avoid development in areas susceptible to flooding (both river and coastal inundation), landslip, erosion, coastal acid sulfate soils, wildfire or geotechnical risk’.¹⁰²

On 18 December 2008, the State Planning Policy Framework (clause 15.08-2) was changed again to reference the 2008 Victorian Coastal Strategy and to introduce explicit policy direction on climate change risks:

Planning to manage coastal hazards and the coastal impacts of climate change should:

- Plan for sea level rise of not less than 0.8 metres by 2100, and allow for the combined effects of tides, storm surges, coastal processes and local conditions such as topography and geology when assessing risks and coastal impacts associated with climate change.
- Apply the precautionary principle to planning and management decision-making when considering the risks associated with climate change.
- Ensure that new development is located and designed to take account of the impacts of climate change on coastal hazards such as the combined effects of storm tides, river flooding, coastal erosion and sand drift.
- Ensure that land subject to coastal hazards are identified and appropriately managed to ensure that future development is not at risk.
- Avoid development in identified coastal hazard areas susceptible to inundation (both river and coastal), erosion, landslip/landslide, acid sulfate soils, wildfire and geotechnical risk.¹⁰³

The new case law and the fast paced development of planning policy and law on climate change coastal risk¹⁰⁴ presented a dramatically different context than that in 2006 when cases that culminated in the issue of the permit for the Southern Ocean Beach House were decided. The precautionary principle was now explicit. Climate change risks were a priority consideration. Planning decisions about coastal developments had to take into account climate change risks and coastal hazards. Hazards had to be identified and managed while developments in areas of coastal hazards were to be avoided. It was unfathomable that climate risks and coastal hazards could any longer be shunted

102 Minister for Planning (Vic), *Victoria Planning Provisions*, Amendment VC45, 17 September 2007, cl 15.08-2 (State Planning Policy Framework). Significant amendments to the State Planning Policy Framework were gazetted on 17 September 2007: see General Manager, Planning, Heritage and Urban Design, Department of Planning and Community Development (Vic), ‘Victoria Planning Provisions: Notice of Approval of Amendment: Amendment VC45’ in Victoria, *Victoria Government Gazette: Special*, No S 223, 17 September 2007, 1.

103 Minister for Planning (Vic), *Victoria Planning Provisions*, Amendment VC52, 18 December 2008, cl 15.08-2 (State Planning Policy Framework). A practice note to explain and supplement the changes was developed, though its focus was exclusively on beach erosion and inundation: Department of Planning and Community Development (Vic), *General Practice Note – Managing Coastal Hazards and the Coastal Impacts of Climate Change*, December 2008. A Ministerial Direction made under the *Planning and Environment Act 1987* (Vic) s 7(5) and enforced through s 12(2)(a) was produced, though it applied only to planning scheme amendments, not permits: Minister for Planning (Vic), *Managing Coastal Hazards and the Coastal Impacts of Climate Change*, Direction No 13, 18 December 2008.

104 This is also the perspective of Peel and Osofsky: see Jacqueline Peel and Hari M Osofsky, *Climate Change Litigation: Regulatory Pathways to Cleaner Energy* (Cambridge University Press, 2015) 127–8.

to a permit condition or delayed and delegated to the developer to fulfill the planning law requirements that rest with the responsible authority.

VIII USING CLIMATE LAW TO INFLUENCE DECISIONS ABOUT THE DEVELOPMENT

In 2008, when the developer of the proposed Southern Ocean Beach House requested an extension of time for its permit, climate change ought to have been one of the central considerations. Then, as now, section 69 of the *Planning and Environment Act 1987* (Vic) gave the ‘owner or the occupier of [the] land’ a right to seek an extension of time for the permit. In the case of an application for an extension of time for a permit where development has not begun,¹⁰⁵ there are a number of non-exclusive factors that may be considered by a responsible authority when deciding whether or not to extend the permit.¹⁰⁶ They include: whether there has been a change of planning control or planning policy since the permit was granted; whether the landowner is seeking to warehouse the permit; intervening circumstances which bear upon the grant or refusal of the extension request; the total lapse of time since the permit was granted; whether the time limit originally imposed was adequate; the economic burden imposed on the landowner by the permit; and the probability of a permit issuing should a fresh application be made.¹⁰⁷



Manifold: The Council rejected the application for a permit extension. But at VCAT the Council failed to raise issues relating to geotechnical risk, climate change or coastal risk. The Council’s arguments were too limited: that the proponent had not justified its delay with respect to the geotechnical assessment upon which all other conditions were dependent; that it was seeking to warehouse the permit; that there had not been any superseding factors to make commencement of the permit unreasonable; and that the planning scheme had substantially changed with the inclusion of a design and development overlay and an Aboriginal significance overlay since the grant of a permit. At the Tribunal hearing initiated by the developer to overturn the Council’s refusal to extend the permit, the lawyers for the Council did not raise climate change or coastal risk.

Our group was, however, prepared this time to make arguments about geotechnical risks, coastal hazards and climate change. We found a pro bono barrister to represent us, and our arguments included clause 15.08 of the State

105 In the recent case of *Hotel Windsor Holdings Pty Ltd v Minister for Planning* [2016] VCAT 351, Deputy President Dwyer noted that there are different considerations at play when the development has already begun: at [54].

106 *Kantor v Murrindindi Shire Council* (1997) 18 AATR 285, recently applied in *D’Agostino v Greater Shepparton City Council* [2015] VSC 332.

107 *D’Agostino v Greater Shepparton City Council* [2015] VSC 332, [40] (Zammit J).

Planning Policy Framework. We thought about focusing much of our attention on climate change and ecologically sustainable development arguments but there were other arguments that our group wanted to make too, meaning that climate change arguments weren't the only ones we made.

We had made a discovery that we felt was fatal to the geotechnical condition upon which the development depended. That condition was based on the 'initial findings and recommendations' of the developer's consultant, Provincial Geotechnical Pty Ltd, in its report of October 2002.¹⁰⁸ However when we reviewed this report on the Tribunal file there were no findings or recommendations upon which to support the condition. The report concluded without them. We alerted the Tribunal and the Council to this finding but no one seemed to act.



Jessup: Notwithstanding the development of climate law, and in particular the insertion into the State Planning Policy Framework of a direction to planning decision-makers to 'identify and avoid development in areas susceptible to flooding (both river and coastal inundation), landslip, erosion, coastal acid sulfate soils, wildfire or geotechnical risk',¹⁰⁹ Senior Member Liston did not turn his mind to the risk. Geotechnical matters were only mentioned in passing. Senior Member Liston noted that the proponent's geotechnical investigations were due to be submitted to the Council.¹¹⁰ However, they never were submitted. The Member ignored the changes in law and policy, including the case law that was integrating the public interest with climate change risk,¹¹¹ by boldly asserting that:

I am of the opinion that a refusal to extend the time of this permit is not in the public interest. The development of this land in its planning context has been considered over an extended timeframe at considerable cost to all of the parties. *There have been no changes to that planning context which warrant a reliving of this process.*¹¹²



Manifold: We had another chance to raise the issues around coastal hazards and climate change, including by using the new Victorian Coastal Strategy, in 2009 when the proponent applied for a permit to subdivide the land and remove

108 *2006 SOBH Case* [2006] VCAT 387, [9] (Order).

109 Minister for Planning (Vic), *Victoria Planning Provisions*, Amendment VC45, 17 September 2007, cl 15.08-2 (State Planning Policy Framework).

110 *Riverland Retreat Pty Ltd v Corangamite* [2008] VCAT 1773, [5] (Senior Member Liston) ('*2008 SOBH Case*').

111 *Gray* (2006) 152 LGERA 258; *Minister for Planning v Walker* (2008) 161 LGERA 423. See also Justice Brian J Preston, 'Climate Change in the Courts' (2010) 36(1) *Monash University Law Review* 15 on this point but moreover for a discussion of important climate adaptation cases in Australia – both judicial review and merits review cases.

112 *2008 SOBH Case* [2008] VCAT 1773, [11] (emphasis added).

and redirect a drainage easement. They made this application before the planning permit conditions, about whether geotechnical hazards existed, had been met. This was almost five years after being directed to undertake a geotechnical investigation.

The new location of the drainage easement was highly undesirable. It would run through a hazard zone and past a natural karst erosion tunnel, which it was believed was linked to the nearby large sea cavern. The evidence was that the change in drainage easement could have significant geotechnical and environmental impacts. The Port Campbell Community Group submitted expert evidence to the Tribunal from two engineers on geotechnical risk and impacts of climate change. The Tribunal refused to view any evidence on these subjects and did not allow questioning on either issue. The Group also cited the increased risk with a more complex system of ownership, but the Tribunal again seemed disinterested.

We wrote in our submissions that the variations of drainage easements were premature without a geotechnical report. The Department of Sustainability and Environment also wrote that the application for subdivision and variation of drainage easements should not occur until the geotechnical condition had been fulfilled. The Parliamentary Select Committee Report the year earlier had recommended that the development of the Project not proceed until the geological assessments were complete and that a geotechnical assessment of the stability of the Port Campbell headland be undertaken. We weren't speaking alone any more.



Jessup: In its October 2009 preliminary judgment on the subdivision permit and the drainage easement,¹¹³ the Tribunal noted and conceded that the planning permit remained subject to unfulfilled conditions.¹¹⁴ With respect to the unfulfilled geotechnical condition, the Tribunal acknowledged that:

This would appear to be of some importance because the adjacent coastline is fragile and the formation of sea caves protruding under the adjacent headland and towards the review site may give rise to questions as to whether the proposed buildings would be safe and sound into the future. In the case before us, Dr Manifold had it in mind to lead evidence in relation to the caves, their current condition, whether they are enlarging, and in relation to geotechnical matters generally. Such questions may very well be important in relation to the existing permit. Indeed, it is always possible that a permit might be amended or cancelled before it is acted on if, for example, there has been a material mistake in relation to the grant of a permit or a material change of circumstances since it was granted.¹¹⁵

Despite identifying the risk and noting its possible implications, the Tribunal did not apply the precautionary principle, it did not consider design aspects to

113 *Manifold v Corangamite Shire Council* [2009] VCAT 2282 (Senior Members Byard and Sharkey) ('2009 SOBH Case').

114 *Ibid* [19].

115 *Ibid* [20].

take account of climate and coastal hazard impacts, and it did nothing to manage the coastal hazard. All of these were required under the State Planning Policy Framework. In a case decided six months earlier by the Tribunal, an applicant for a planning permit to subdivide land was required to prepare a coastal hazard vulnerability assessment before the Tribunal would contemplate the grant of the permit.¹¹⁶ By contrast in the *2009 SOBH Case*,¹¹⁷ the Tribunal took a very narrow view of its role, not daring to revisit the planning merits of the project. More alarming than the decisions of the Tribunal in the *2005 SOBH Case* and the *2006 SOBH Case* to divest responsibility for identifying and managing geotechnical risks to the proponent, in this case the Tribunal delegated responsibility to Dr Manifold to redress the faults with the permit if she dared to initiate separate proceedings.¹¹⁸ In such proceedings Dr Manifold or the Port Campbell Community Group would potentially have been exposed to legal costs.¹¹⁹



Manifold: We had a final chance to make our arguments without the threat of costs when the Tribunal asked parties to consider finer details about the proposed drainage easement removal in 2010. We provided an expert letter regarding the problems and risk of redirecting a drainage easement close to the largest sea cavern. The Tribunal seems to have ignored this advice. And despite the Tribunal asking the developer for further information on drainage easements and stormwater, and the community group showing that this had not been provided, the easements and the subdivision were approved by the Tribunal in April 2010.¹²⁰

We couldn't convince the Tribunal to follow its own requirements. What hope did we have to convince them to consider the risks of the project?

116 *Myers v South Gippsland Shire Council* [2009] VCAT 1022 (Member Bilston-McGillen).

117 [2009] VCAT 2282.

118 *Planning and Environment Act 1987* (Vic) ss 87(1)(d) and 87(3)(b) would have been the relevant provisions.

119 Victorian Civil and Administrative Tribunal, *Practice Note No PNPE3 – Cancellation & Amendment of Permits and Stop Orders*, 15 March 2012, 7–8 [35] states:

Although the normal principle at the Tribunal is that each party must bear its own costs, the Tribunal has power to order the payment of costs where it considers that circumstances justify it in doing so (s 109(3) of the *Victorian Civil and Administrative Tribunal Act 1998*). Costs orders are more commonly made in relation to applications to cancel or amend a permit, and for stop orders, than for applications to review decisions by responsible authorities. For example, the bringing of an unjustified application to cancel or amend a permit or application to stop development, especially by a non-permit holder under s 89, may result in an order for costs being made.

120 *Manifold v Corangamite Shire Council* [2010] VCAT 630 (Senior Members Byard and Sharkey) ('*2010 SOBH Case*').

IX A ROBUST CONSIDERATION OF CLIMATE CHANGE AND COASTAL RISK SEVEN YEARS LATE, YET THE PROJECT PERSISTS

The developer had two permits: one to support the development and one to support the subdivision and sale of apartments. But work didn't begin on the project. There was no evidence of geotechnical investigations and certainly no geotechnical report as required under the planning permit. The people most active working on the headland were our group tree planting, weeding, picking up litter, and monitoring and recording sightings of endangered bandicoots.

The planning permit expired again in August 2010. We were in regular contact with the new planning officer and expected another application to be made by the developer to the Council for a second extension. We had prepared materials to send to the Council in the event of hearing about an application. Those materials contained a brief on the evolution of climate change and coastal risk law compiled with the guidance of Brad Jessup.

The planner's rejection of the permit extension appeared to us to be guided by the expertise in Brad's brief.



Jessup: By the time the Council came to reach a decision on the application for the second extension to the permit, the Tribunal had grappled with the changes made to planning law and policy.¹²¹ In particular, the Tribunal had acknowledged the renewed emphasis on climate change and coastal risks in the 2008 Victorian Coastal Strategy. In *Taip v East Gippsland Shire Council*, Member Potts claimed that the broad sweep of policy that was instituted in late 2008 now meant that decision-makers must be more cautious and mindful of the multiple impacts of climate change on coastal areas.¹²² Moreover, '[t]here is a planning policy imperative to act now rather than later'¹²³ and to assess vulnerability at the site-specific scale.¹²⁴ In an earlier case¹²⁵ Member Potts rejected a proposed subdivision in low-lying coastal land accordant with the decision-making process in the State Planning Policy Framework and the precautionary principle.¹²⁶ Reflecting on this case and contemporaneous similar cases, especially of the Tribunal, Peel and Osofsky noted that the consideration of coastal adaptation risks in planning decisions had been 'mainstreamed'.¹²⁷

121 Zahar, Peel and Godden note that there was a 'stream of cases that came before VCAT from 2009 to 2011': Alexander Zahar, Jacqueline Peel and Lee Godden, *Australian Climate Law in Global Context* (Cambridge University Press, 2013) 389.

122 (2010) 177 LGERA 236, 247 [69] (Member Potts).

123 Ibid 253 [105].

124 Ibid 239 [9].

125 *Myers v South Gippsland Shire Council [No 2]* [2009] VCAT 2414 (Members Bilston-McGillen and Potts).

126 Ibid [32].

127 Peel and Osofsky, above n 104, 128.

Despite the view that climate change coastal risk was embedded in the planning system, scholarship showed that inconsistency was prevalent in land use decisions.¹²⁸ McDonald also reached the view in her work that ‘in relation to planning for coastal hazards in Victoria ... local governments [are] struggling to implement framework objectives in the absence of detailed guidance and direction’.¹²⁹ With respect to the application for a second extension to the planning permit for the Southern Ocean Beach House, the Council planning officer was acutely mindful of the changes to clause 15.08 of the State Planning Policy Framework. His recommendation to the Councillors¹³⁰ was consistent with the approach in the cases of *Taip* and *Myers* and with the decision-making matrix for planning permit extensions from *Kantor*. The planner made the point, as explored in this article that:

There is no evidence that climate change risks or the requirements of the 2008 policies in Clause 15.08 of the Scheme were considered in the context of the initial development assessment or the decision by VCAT to grant the first extension of time request. These are new policy matters relevant to the current extension of time request.¹³¹



Manifold: The new council planner assessed the application carefully and recommended the Council refuse to extend the permit. He noted that over the preceding two years ‘no additional information has been submitted by the applicant’.¹³² Overwhelmingly the rationale for rejecting the extension was a failure to fulfill the geotechnical condition and the risks faced by the coastal environment, including those caused by climate change. He referred to the new planning policies regarding risk avoidance, integrated coastal planning, and an application of the precautionary approach.¹³³ He also referred to the ‘potential for cliff recession, collapse or partial collapse of any of the sea caves, collapse of the cliff face and collapse of sink holes or other karst features’¹³⁴ and impacts of a ‘substantial intensification of development’.¹³⁵ And he referred to the risk posed by a complex ownership pattern of the subdivided Southern Ocean Beach House.¹³⁶

In light of the changes brought about by Amendment VC52, specifically clause 15.08 and the need for a Coastal Hazard Vulnerability Assessment, which

128 Macintosh, above n 16, 1046–7.

129 Jan McDonald, ‘Hot in the City: Planning for Climate Change Impacts in Urban Australia’ in Peter Christoff (ed), *Four Degrees of Global Warming: Australia in a Hot World* (Routledge, 2013) 172, 183.

130 Corangamite Shire, ‘Ordinary Council Meeting’ (Meeting Minutes, 28 September 2010) 21–6.

131 *Ibid* 24.

132 *Ibid* 22.

133 *Ibid* 22–4.

134 *Ibid* 24.

135 *Ibid*.

136 *Ibid*.

he described as representing ‘a paradigm shift’¹³⁷ – the very words we used – the planner concluded that a new permit should not be granted.¹³⁸ He found that:¹³⁹

[there ought to] be a greater consideration of climate change hazards, as well as consideration of possible management requirements to mitigate risks (For example a climate change management plan or the consideration of protection works).

The permit in its current form is considered inadequate in relation to requirements relating to adaptation to climate change, including the potential impacts arising from local coastal processes at Port Campbell.

What we had been arguing for two years about climate change impacts, and for close to a decade about the geotechnical risks associated with the permit, had been heard. We read the report, heard the report at the Council meeting, and anticipated the permit extension application would be rejected.

But more than half of the Councillors ignored the Council planning officer’s recommendation and approved the permit extension. The vote was 3-3. One Councillor was absent so the Mayor used his casting vote to pass the permit extension. There was little sense of precaution, or giving the environment the benefit of the doubt. The permit was extended even though the same Councillors two years previously had refused a permit extension on the ground that the Southern Ocean Beach House had already had long enough to start the development.

The Council resolved to extend the permit such that works must commence by 26 August 2012 and be completed by 26 August 2014.¹⁴⁰ We were disappointed. We had no right of appeal.¹⁴¹ We would wait, and we would watch.



Jessup: Just days before the Council hearing that approved the permit extension, the planning law concerning coastal risks and climate change was revised again. A new clause 13 dealing with ‘Environmental Risks’¹⁴² was introduced into the State Planning Policy Framework in identical language to clause 15.08.¹⁴³ However, the clause had a renewed and clear objective that: ‘[p]lanning should adopt a best practice environmental management and risk management approach which aims to avoid or minimise environmental degradation and hazards’.¹⁴⁴ Dr Manifold and her group did not get the benefit of best practice planning directed to avoiding or minimising hazards throughout the entire legal process and not at this juncture. Hazards highlighted in government

137 Ibid 25.

138 Ibid.

139 Ibid.

140 Ibid 26.

141 *Planning and Environment Act 1987* (Vic) s 81 only allows for reviews of refusals to grant extensions not to seek review of decisions of responsible authorities to extend a permit.

142 It is a clause that in its original form has been critiqued by others as directing planning decision-makers to uncritically reject developments: see Macintosh, above n 16, 1040–1, 1044, 1047–9.

143 Minister for Planning (Vic), *Victoria Planning Provisions*, Amendment VC71, 20 September 2010, cl 13 (State Planning Policy Framework).

144 Ibid cl 13 (Preamble).

policy, raised by the community and essential to the council planner's report were not addressed by the Council in its decision.



Manifold: Due to our Group raising concerns to the Parliamentary Inquiry on the impact of the development on the headland's stability, in 2011 the Department of Sustainability and Environment conducted a Coastal Risk Assessment of the Port Campbell headland. It was a start, and something we achieved. However, it was not complete or thorough. Four geo-experts provided written comments to the Minister for Planning, the Department of Sustainability and the Council that the assessment was inadequate, that it failed to consult with necessary experts, and that it demonstrated an inadequate knowledge of the local landscape and coastal processes while failing to consider impacts from changes to increased run-off from potential development.

The Coastal Risk Assessment did nothing to ameliorate our concerns. In fact, it heightened our concerns that mistakes are continually made in planning and that important decisions may be made based on such inadequate assessments.

The permit lapsed in August 2012, and the Southern Ocean Motel was put up for sale in 2013.¹⁴⁵ The Port Campbell Community Group was waiting to hear if and how the new owner would develop the site and what function the 2011 government Coastal Risk Assessment might play in any project design. However, in October 2016 the site was again listed for sale. We wait and watch once more.



Jessup: Over the years since the introduction of the 'Environmental Risks' clause in the State Planning Policy Framework, it has been modified in order to temper some of the definitive and uncritical applications of the law, to provide scope for local adaption and to respond to community consternation.¹⁴⁶ As at October 2016,¹⁴⁷ clause 13.01-1 of the State Planning Policy Framework directs decision-makers in the following modified ways:

Plan for possible sea level rise of 0.8 metres by 2100,¹⁴⁸ and allow for the combined effects of tides, storm surges, coastal processes and local conditions such as topography and geology when assessing risks and coastal impacts associated with climate change.

145 Mary Alexander, 'Prime Coastal Real Estate Selling at "Bargain Basement" Prices', *The Standard* (online), 11 September 2013 <<http://www.standard.net.au/story/1767328/prime-coastal-real-estate-selling-at-bargain-basement-prices/>>.

146 Macintosh, above n 16, 1050.

147 Minister for Planning (Vic), *Victoria Planning Provisions*, Amendment VC130, 4 July 2016, cl 13.01-1 (State Planning Policy Framework). Significant amendments to the State Planning Policy Framework were gazetted on 4 February 2016: see Acting Executive Director, Statutory Planning and Heritage, Department of Environment, Land, Water and Planning (Vic), 'Victoria Planning Provisions: Notice of Approval of Amendment: Amendment VC127' in Victoria, *Victoria Government Gazette: General*, No G 5, 4 February 2016, 159.

148 Rather than 'Plan for sea level rise of not less than 0.8 metres'.

Consider the risks¹⁴⁹ associated with climate change in planning and management decision-making processes. ...

Ensure that land subject to coastal hazards are [sic] identified and appropriately managed to ensure that future development is not at risk. ...¹⁵⁰

Avoid development in identified coastal hazard areas susceptible to inundation (both river and coastal), erosion, landslip/landslide, acid sulfate soils, bushfire and geotechnical risk.

While the omission of the precautionary principle from the provisions is notable, it is not significant. The precautionary principle remains integrated into the Victorian planning system¹⁵¹ and it was the application of that principle that triggered VCAT's intervention in coastal risk cases in advance of the changes to the State Planning Policy Framework.¹⁵²

Moreover, planning decision-makers must consider insofar as relevant the revised 2014 Victorian Coastal Strategy,¹⁵³ and are required to apply the 'hierarchy of principles for coastal planning and management'¹⁵⁴ restated in the Strategy. The Strategy reiterates that adapting to climate change is a key issue for the state¹⁵⁵ and that one of the notable impacts of climate change is increased risks of cliff erosion.¹⁵⁶ It embraces hazard identification and assessment processes¹⁵⁷ as best practice planning methodology.

In light of the depth of policy development and the evolution of climate change coastal risk case law, particularly by VCAT, it is inconceivable that the same development presenting geotechnical risks could be approved in advance of evidence being obtained that development on the land will not increase coastal hazards. On critical reflection, it is also unlikely that the developer of the Southern Ocean Beach House did not undertake any geotechnical investigations over at least the six-year period of the life of the planning permit. The implication must be that the developer simply could not conjure a feasible project that did not generate geological risks with the investigations it did. The reason that the project did not proceed is because it should not have been approved in the first place. A similar project would face the same kind of assessment prepared by the Council planner with respect to the second permit extension. It would be remarkable if councillors would ignore such a report again with the knowledge

149 Rather than 'Apply the precautionary principle to planning and management decision-making'.

150 Omitted is a direction to '[e]nsure that new development is located and designed to take account of the impacts of climate change on coastal hazards'.

151 Minister for Planning (Vic), *Victoria Planning Provisions*, Amendment VC127, 4 February 2016, cl 12 (State Planning Policy Framework).

152 *Gippsland Coastal Board* [2008] VCAT 1545, [41], [48].

153 Victorian Coastal Council, 'Victorian Coastal Strategy 2014' (Government Strategy, July 2014).

154 Minister for Planning (Vic), *Victoria Planning Provisions*, Amendment VC130, 4 July 2016, cl 12.02-1 (State Planning Policy Framework). The hierarchy is further set out in Victorian Coastal Council, 'Victorian Coastal Strategy 2014', above n 153, 29.

155 Victorian Coastal Council, 'Victorian Coastal Strategy 2014', above n 153, 17.

156 *Ibid* 20, 51.

157 *Ibid* 22.

that VCAT, responsible for the evolution of the climate change and coastal risk case law in Australia, would be called upon to review its decision.¹⁵⁸



X CONCLUDING REMARKS: WHAT HAS BEEN LEARNT? WHAT NEEDS TO BE RETHOUGHT?

Manifold: Coastal risk and climate change became increasingly pivotal issues in the development of this case. At the beginning of this proposal, climate change was scarcely considered in planning law. We learnt a lot about the law, the function of planning in the coastal environment, and more about our local landscape. Our group did not initially fully understand the importance of the connection between climate change, coastal risk and the geotechnical instability that made the Southern Ocean Beach House an unsuitable development for the geomorphologically vulnerable and culturally and ecologically significant Port Campbell headland. The connections have now been accepted as real, and have been incorporated into planning policy. There are also government programs assessing coastal risks, including the Victorian Government's Climate Adaptation Plan¹⁵⁹ and the Future Coasts Program. Through this lengthy process we learnt a lot about the law, the function of planning in the coastal environment, and more about the local landscape. We hope we have had some influence on government policy and programs. For over ten years we have been the only people talking about, researching, and raising in the public arena the risks of cliff collapse in Port Campbell. This is a risk that was acknowledged by the Parliamentary Select Committee on Public Land Development¹⁶⁰ and the Australian Government.¹⁶¹ Since beginning our work, it has also been articulated in a Victorian Government flyer explaining the dangers of 'living with cliffs'.¹⁶² In 2009, in the report 'Climate Change Risks to Australia's Coast', the Australian Government noted:

Cliffed soft-rock shores are also a notable feature of the Victorian open coast (6 per cent) compared to most other states; these include the well known soft limestone coasts near Port Campbell which are actively receding and can be expected to recede faster with sea-level rise.¹⁶³

158 Community members, like the Port Campbell Community Group, would have a right to seek review of a permit decision should they object, under the *Planning and Environment Act 1987* (Vic) s 82(1). However, they did not have such a right in response to the Council's decision to extend the permit in 2010.

159 Government of Victoria, 'Victorian Climate Change Adaptation Plan' (Government Plan, March 2013) 70–1.

160 Select Committee of the Legislative Council on Public Land Development, above n 68, 139, 141–2.

161 Department of Climate Change (Cth), 'Climate Change Risks to Australia's Coast: A First Pass National Assessment' (Report, 2009) 92.

162 Department of Environment and Primary Industries (Vic), 'Living with Cliffs – Port Campbell: Case Studies from Victoria's South-West Coast' (Fact Sheet, September 2013).

163 Department of Climate Change (Cth), above n 161, 92.

We found throughout the process the willingness of experts to be involved in the matter and our cases. They expressed concern about the impacts and risks of the proposed development. They offered their independent expert evidence and expected that the government would listen to their expertise. Government departments and officials listened, took on advice, and expressed concern, but they seemed powerless and constrained by their budgets from doing anything meaningful. In the case of the local Council, they seemed to lack the skills and expertise to grapple with the matters of geotechnical risk.¹⁶⁴ They produced inconsistent decisions, and when presented with clear recommendations to deal with risks, Councillors seemed to be ignorant – of their responsibility, the risk, and the law.

Those who did have power were immovable. VCAT did not listen. The members did not appear to care about the risks we had identified. They seemed to afford too much weight to their interpretation of planning strategies and the views of the developer's top-gun lawyer.¹⁶⁵ Our local knowledge and experience counted for nothing. We were outsiders. We were the ones they were questioning. The Minister wouldn't exercise his power to call in the development owing to its risk, even though members of the government were concerned about the development.¹⁶⁶

Still, the fact that the project is not proceeding is perhaps a testament to local knowledge and our determination to ensure the project's risks were fully investigated.



Jessup: Barnett et al¹⁶⁷ argue for a community-based and consensus-based approach to coastal adaptation with decisions framed around the 'characteristics of their local places'.¹⁶⁸ Their view is that organisations like the Port Campbell Community Group should certainly have a role and responsibility in planning decisions, as they did in this case. Community should also have some control over the process and be embedded within it. In the context of the coastal risk planning decisions situated in East Gippsland, they note that decisions are:

164 This is a perspective deduced from McDonald in her research: see McDonald, above n 129.

165 Macintosh is critical of VCAT members and processes in the context of climate change, noting that:

VCAT also suffers from the same, if not worse, capacity constraints concerning the evaluation of coastal climate hazards as councils. While VCAT members all have skills and expertise in particular areas, few have a detailed knowledge of climate change and, in hearing cases, have limited capacity to investigate relevant issues.

Macintosh, above n 16, 1047 (citations omitted).

166 Two government ministers in their minority report to the Parliamentary Select Committee of the Legislative Council on Public Land Development claimed that:

the only positive changes that have occurred as a result of this committee's work has come from the efforts of Government members – the progress towards community consultation in regards to Caulfield Racecourse Reserve and the attention of the Minister drawn to the public safety concerns at the Port Campbell headland.

Select Committee of the Legislative Council on Public Land Development, above n 68, 221.

167 J Barnett et al, 'A Local Coastal Adaptation Pathway' (2014) 4 *Nature Climate Change* 1103.

168 Ibid 1106.

complicated by degrees of resistance to outside and expert framings of risks, typically inadequate inclusion of local knowledge and values, failure to agree on the goals of adaptation, and processes that do not allow for the slow working through of psychological, spiritual and emotional responses.¹⁶⁹

This is a perspective that the authors reached following empirical work.¹⁷⁰ However, these are the kinds of views also reached by environmental justice activists who take a critical view of the goals of participation and access to justice that have preoccupied scholars, including environmental law scholars, for decades.¹⁷¹

VCAT, as a forum for review of decisions under the *Planning and Environment Act 1987* (Vic), is an exemplar of best practice legal access and legal participation.¹⁷² However, as this article has shown, participating in legal decisions and being able to be a party to proceedings before VCAT does not guarantee participants being listened to, having their knowledge treated seriously or their concerns critically evaluated.¹⁷³ If they had been, from the earliest cases VCAT would have made the necessary connections between climate change in planning law and the geotechnical risks being raised by the members of the Port Campbell Community Group. VCAT would not have simply divested responsibility for these matters to the proponent of the development. Put another way, if our legal regime was less concerned about the fact of access and more about respecting and recognising groups engaged with the law, then when climate change was expressly raised in planning policy and law and in legal argument, VCAT would have dealt with it. It would not have been amused by the efforts of the community to convince it of the importance of addressing risks. It would not have persisted in believing that it had satisfied the legitimate, government-validated concerns of the community and of independent experts by simply including a clause in the planning permit about geotechnical investigations.

Elsewhere there has been a strong criticism of the type of adaptive/responsive conditions in environmental instruments that were used in the South Ocean Beach House planning permit for geotechnical risk. These are projects that are approved subject to conditions for further investigative work, with the project altered to meet environmental management criteria when that work is complete.¹⁷⁴ Primary among the criticisms of these conditions is that they are too often used in the absence of scientific clarity; that is, where there is no or insufficient baseline data upon which to adapt, nor any sense of

169 Ibid 1103.

170 Ibid.

171 See, eg, Cole and Foster, above n 9; Schlosberg, above n 9.

172 For example, *Planning and Environment Act 1987* (Vic) ss 82(1), 82B, 114(1), 149B. Edgar identifies positive features of the VCAT legal process leading to increased participation compared to other legal forums: Andrew Edgar, 'Participation and Responsiveness in Merits Review of Polycentric Decisions: A Comparison of Development Assessment Appeals' (2010) 27 *Environmental and Planning Law Journal* 36, 44, 49.

173 See Felicity Millner, 'Access to Environmental Justice' (2011) 16 *Deakin Law Review* 189, who offers other bases for critique of planning Tribunal processes.

174 Jessica Lee, 'Theory to Practice: Adaptive Management of the Groundwater Impacts of Australian Mining Projects' (2014) 31 *Environmental and Planning Law Journal* 251.

environmental limits for damage.¹⁷⁵ Adaptive conditions have been criticised especially because there is a tendency to use them ‘as an excuse to defer difficult planning and management decisions’¹⁷⁶ and because of the lack of transparency and accountability consequent upon delaying and divesting responsibility.¹⁷⁷ Advocates of adaptive management in the context of climate change hazards have argued that this form of management requires actors to embrace ‘[c]ommunity governance and participatory structures’¹⁷⁸ to be effective, and that what should be pursued is ‘[a]daptive co-management’ between government, proponents and communities,¹⁷⁹ with each party being recognised for their knowledge and capacity to build social, and moreover climate, resilience.

This article has sought to record a social and legal history of a regional coastal conflict and to demonstrate the danger of the operation of planning laws in a state of legal flux responding to climate and coastal science. The case study crystallises reasons for being concerned about delaying and divesting scientific investigations in cases involving dynamic environmental matters. Such action entrenches an approval pathway. Legal technicians are loath to disturb approvals already granted. In the case of VCAT, it was unwilling to contemplate that it had a function or a role to revisit a purportedly erroneous decision.¹⁸⁰ In this respect so-called adaptive approval conditions were not required, but instead an adaptive legal process was needed. An adaptive legal process would not have twice extended a permit for a development that could not establish its environmental feasibility or an acceptable level of environmental risk. As knowledge of environmental risks became clearer, the nature of the risks more acute, and the inability of the developer to fulfil the conditions more apparent, the appropriate course of action should have been to repudiate the permit. Someone ought to have stepped in, be it the Minister (as the Port Campbell Community Group argued), VCAT, or another agency altogether.

Macintosh has argued that ‘adaptation to coastal climate hazards will usually be an iterative process, with measures being refined over time in response to new information on threats, changing preferences, and feedback on the successes and failures of previous approaches’.¹⁸¹ The law must be a part of that iterative and refining process. It cannot be static, rather it needs to be responsive. Surety and certainty in planning processes and decisions for developers may be laudable goals worth forgoing if it means that unreasonable risks are not taken and climate hazards are avoided. Moreover, the academy needs to be adaptive and responsive. In the same way that the scholarly members of the Climate Council¹⁸² have responded to the absence of government policy and information, climate

175 Ibid 257.

176 Ibid.

177 Ibid.

178 Emma L Tompkins and W Neil Adger, ‘Does Adaptive Management of Natural Resources Enhance Resilience to Climate Change?’ (2004) 9(2) *Ecology and Society*, Article 10, 3 <<http://www.ecologyandsociety.org/vol9/iss2/art10/>>.

179 Ibid 9.

180 *2009 SOBH Case* [2009] VCAT 2282.

181 Macintosh, above n 16, 1037.

182 Climate Council, *Meet the Experts* (2016) <www.climatecouncil.org.au/councillors>.

legal scholars can offer to the community expert guidance and information to help ferment and clarify legal change.