Guidance on Local Government Climate Change Adaptation Roles and Responsibilities under Victorian Legislation:

Legislative Analysis and Community Consultation Report

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Report to Victorian Department of Environment, Land, Water and Planning, Climate Change Policy Branch (DELWP)

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Notes on Terminology

The terms ‘local government’, ‘municipal councils’, and ‘local councils’ are all used interchangeably throughout this report to reflect the terminology used in the statutes being reviewed. For the purposes of this report, they all have the same meaning.

Executive Summary

This project is part of a broad suite of activities funded by the Department of Environment, Land Water and Planning (DELWP) under *Victoria's Climate Change Adaptation Plan 2017-2020* (DELWP 2016). The *Climate Change Adaptation Plan*, under part 4.2 'A Partnership with Local Government', aims to 'help local governments to understand and deliver on their responsibilities for adaptation'. One action is to develop guidance materials for local governments on their roles and responsibilities under legislation. This report presents both a legislative analysis and the outcomes from four workshops held in March 2019 with local governments in different regions of Victoria. The findings inform the design of guidance materials for local governments.

The question of legislative responsibility for decision-making in the context of climate change risk and adaptation is an increasingly significant issue for federal, state, and local governments in Australia. The legislative framework is complex, with different responsibilities held by various entities. As a result, clarifying whose responsibility it is to manage climate change risks and consequently climate adaptation responses can be challenging.

There is a need to assist local governments to make robust decisions, in light of both the legislative framework and the practical on-the-ground needs of local government staff. To that end, this report adopts a 'reasonable person' lens to step into the shoes of a decision-maker and consider how climate change risk ought be navigated. We engaged with stakeholders across different local government areas in Victoria to explore with them how they make decisions and what is useful for them in light of climate change risk and decision-making. The results of this consultation process are discussed later in this report. The guidelines that accompany this report are the end product of both the legal analysis and the consultation process.

Approach to the Project

The introduction presents the context and approach used in this legislative review. The Project Team (led by the authors of this report) adopted a 'co-design' method for developing the scope of the project. This process included consultation with a local government 'Stakeholder Advisory Group' ('StAG'), which included representatives of two local government Greenhouse Alliances (WAGA and NAGA), the Municipal Association of Victoria, and members of the DELWP Climate Policy Branch. The StAG also played a crucial review role, along with the Project Teams' two external peer review experts.

During the scoping of this project, legal considerations with respect to *elected officials* were deliberately excluded due to other DEWLP projects. Due to the expansive nature of climate change risk, we touch very generally on where relevant local government law might relate to fiduciary duties that could encompass climate change risk, but this report is not an assessment of those types of legal duties. The review was confined to the following list of legislation and, where relevant, common law principles:

1. *Local Government Act 2020* (Vic).
2. *Planning and Environment Act 1987* (Vic).
3. *Wrongs Act 1958* (Vic).
4. *Climate Change Act 2017* (Vic) (and Acts listed in Schedule 1).

5. *Coastal Management Act 1995* (Vic) (now the *Marine and Coastal Act* 2018 (Vic)).
6. Common law principles, where relevant to actions in negligence under tort and land use planning law only.
7. Relevant case law, where this aids in the interpretation of the above legislation.

Through early consultation with key stakeholders, it was determined that the framing of the analysis and consultations via the lens of reasonable person would be particularly relevant. This responds to the now pervasive argument that climate change risk is foreseeable, is not insignificant, and that a 'reasonable person' in the shoes of the relevant decision-maker will have taken climate change into account. A reasonable person lens also directly aids local government decision making.

Key Findings

The legal analysis of regulatory requirements relevant to local government decision-making in Victoria, Australia has identified the following key issues that require further analysis in clarifying the roles and responsibilities of both state and local governments.

Challenges and Opportunities

- There is no mention of 'climate' or 'climate change' in the *Planning and Environment Act 1987* (Vic), nor is it an Act listed in Schedule 1 under the *Climate Change Act 2017* (Vic).
- There is a need to ensure that land use planning policies and coastal management options are developed, implemented and enforced in light of reasonably available climate change information.
- There is a need to ensure that any requirements arising from state-implemented Climate Change Strategies or Local Adaptation Plans are met.
- Local governments must continue to ensure they have optimal governance processes in place to enable effective decision-making.
- The *Local Government Act 2020* makes clear that local government has a responsibility to incorporate climate change considerations into decision-making processes.

Local Government Needs: Consultation Outcomes

A series of four workshops were held in Warrnambool, Echuca, Melton, and Melbourne, inviting a range of local councils to each. The consultation outcomes coalesced around a series of key themes, challenges, and opportunities for the implementation of climate change adaptation policy, strategies and plans across Victoria:

1. Local governments expressed a concern at the **lack of clarity** in some legislative frameworks and relevant legislation for local government decision-making for climate change adaptation.
2. There is a need for clarity in relation to **specific and required decision-making tasks**, (with a specific emphasis on land use planning and building regulations and policy), including the **need for clear and useable data.**
3. There is an identified need for clear **approaches to recording and reporting** decisions as a form of 'risk register' and the opportunities for creating certainty.
4. There is an identified need for method and approaches that better enable **communication within local government and with the public** about these issues.

5. There remains a need at an institutional level to include new considerations for **managing resources and capacity**, emerging from climate change adaptation responsibilities. There are clear challenges on this issue for smaller local councils.
6. There was an expressed desire for **further legislative reform**, such as inserting an explicit climate change adaptation agenda into the *Planning and Environment Act 1987* (Vic).

Limitations of This Report

The legal areas of focus for this report are tort law (negligence) and administrative law (land use planning decision-making processes) and particularly in exploring the reasonable person as decision-maker. It is not intended to be an exhaustive legal analysis, and nothing in this report nor the accompanying guidelines are to be taken as legal advice. This project was designed and implemented as a broader social research project, informed by law but with the core aim of assisting local government decision-making processes.

Causes of action and potential legal liability may arise for local government in a variety of contexts or circumstances. Whether this happens will depend on the particular and unique circumstances surrounding an alleged act or omission which in turn gives rise to a case of action. Any entity, including local government, should seek and obtain its own independent legal advice as applicable to those circumstances.

In no way is the analysis contained herein to be construed as legal advice.

Finally, the report is concerned only with local government roles and responsibilities. There remains an opportunity to undertake analysis which includes state government roles and responsibilities, and of the delineation as between local and state government responsibilities for climate change adaptation in Victoria.

Recommendations

Along with the issues, challenges, and opportunities presented above, three overarching recommendations emerged from the research undertaken in this project. If implemented, these recommendations could improve decision-making frameworks and enhance governance mechanisms for local government to enable good decision-making for climate change adaptation outcomes.

1. Create a state government-led collaborative strategy aimed at providing information and advice from a range of experts to local government in the form of consultative workshops on climate change adaptation implementation.
2. Provide a clear toolkit or other process to make clearer the specific requirements for local government vis-à-vis state government and third-party entities.
3. Develop a climate change risk register at the State level, which enables the tracking of physical, transitional, associated with climate change risks, impacts, and decision-making frameworks. This could inform the above recommendations as well as providing an evidence base for future policy priorities and strategies. Ensuring that local government update their risk registers to include climate change considerations would complement a State level climate risk register.

1. Introduction

The risks and impacts as a result of climate change are well known. Climate change poses significant social, environmental, and economical consequences that will interact across geographies and over time (IPCC 2018). The systemic nature of these risks and impacts is well known (consider, for example, the plethora of research conducted under the National Climate Change Adaptation Research Facility 2009-2017). Feedback loops will also influence the responsiveness of adaptation strategies across geographies and over time (Wise et al. 2014, p. 332). One entry point into this complex system is that of law.

When we think of law in the context of climate change risk, there has been an overwhelming tendency in Australia to narrow this toward legal liability concerns. The Australian Productivity Commission in its 2012 report, *Barriers to Climate Change Adaptation*, highlighted the lack of clarity with respect to potential local government legal liability as a barrier to climate change adaptation. In 2016, a published legal advice (Hutley and Davis 2016) outlined liabilities that may arise for private company directors under the *Corporations Act 2001* (Cth) for breach of fiduciary duties where there is a failure by company boards to properly consider or disclose climate change risk. Despite these inroads, the complexity of embedding governance processes that appropriately factor in climate change risk, impacts, and adaptation responses within public institutions remains.

In light of the pervasiveness of climate change impacts and associated risks, decision-making for local and state government across Australia is increasingly complex. Public institutions, including government, ought consider climate change risk in in their decision making. However, whether there is a legal obligation to do so is dependent on a variety of factors, including jurisdictional and statutory requirements. Requirements at law for good decision making exist irrespective of climate change impacts; however, these requirements are progressively demanding specific consideration of climate change impacts and climate change adaptation. Furthermore, there exists in Victoria specific legislative requirements under the *Climate Change Act 2017* (Vic).

Public institutions such as local and state governments are engaged in multiple activities that are impacted by climate change. These activities require appropriate consideration of climate change risk in order to prevent those activities from being negatively impacted. These activities may include: environmental and ecosystem management; land use planning decisions, including zoning of land, strategic planning policies, and development approvals; emergency management and community safety response roles; and the management of larger assets including state significant infrastructure such as airports, harbour ports, transport, and agricultural and energy systems. More broadly, public institutions, through policy, have an important role in encouraging financial investment in specific sectors or in specific geographical localities.

Added to these considerations are the structural and governance complexities within many ‘public’ institutions. Public institutions are engaged in a range of activities, not all of which may fit within a more generally understood definition of ‘public’. Examples of this include the creation of public authorities that are governed by a board of directors, or pursuits that cross public/private partnerships and potentially enliven dual or multiple legislative and jurisdictional requirements (consider, for example, the Murray Darling Basin Authority). Recent research carried out by the Centre for Policy Development details some of these

considerations with respect to climate change risk and fiduciary duties for public authorities (Dibley, Hurley and Sheppard 2019).

In using law as an entry point, the primary purpose in this research report is to illustrate how local government can undertake good decision-making practices that take appropriate account of climate change risk in Victoria, Australia. To do so, we explain local government roles and responsibilities as identified within some Victorian legislation, complemented with a 'reasonable person' framing which is readily identifiable in common law. We then undertook consultation workshops where our legal analysis was presented and discussed with local government staff and representatives in rural, regional, and metropolitan localities. Finally, we developed a decision-making guidance brief to aid in local government operations. This brief is a separate though accompanying document to this report.

1.1 A Focus on Local Government

The Victorian government's *Climate Change Adaptation Plan 2017-2020* ('the Plan', published in 2016) sets out a framework for working with local government in the implementation of both the Plan, and its statutory parent, the *Climate Change Act 2010* (Vic)[1]. Part 4.2 of the Plan specifies as a key priority area, 'A partnership with local government'. This partnership is to be underpinned by three primary pillars: a Memorandum of Understanding stipulating how state and local government will work together; a program of activity aiming to build local government capacity for enabling adaptation; and targeted support for local adaptation projects.

Within the plan is an overarching recognition of the key role local government plays in climate adaptation, including, *inter alia*, recognition of local government's role in developing and delivering locally appropriate adaptation responses. Research has repeatedly highlighted the centrality of local government (both in terms of governance and of operations) for managing climate change risk that, in turn, positively influences the uptake of climate change adaptation (Measham et al. 2011; O'Donnell et al. 2019).

The specifications for this research project required the development of four key deliverables in analysing climate change adaptation responsibilities for local government. The analysis is concerned with where local government climate change adaptation roles and responsibilities are explicitly stated in legislation, and where local government roles and responsibilities under this legislation may be expected to include consideration of climate change risk by a relevant decision maker. The four components of the project include:

- The development of an effective project methodology.
- The completion of an analysis of climate change adaptation-related responsibilities for local government under relevant Victorian legislation.
- Targeted community consultations to explore the understanding and interpretation of current climate change adaptation responsibilities within local governments.
- The production of this report and the guidance brief, both to assist local governments to strengthen their capacity in delivering on these responsibilities.

[1] Now the *Climate Change Act 2017* (Vic).

1.2 Our Approach to Developing Guidance for Local Government

As part of a co-design process, the Project Team collaborated with our Stakeholder Advisory Group (this included representatives of two local government Greenhouse Alliances, WAGA and NAGA, and the Municipal Association of Victoria), and members of DELWP to develop the framework of legislative review.

The parameters for the review were as follows:

- The review is confined to the legislation specified in section 2, where that legislation identifies a responsibility owed by local government.
- The Project Team use the framing of a 'reasonable person' to guide the research project. Through this lens, primary consideration was given to tort law principles (negligence) and administrative law decisions pertaining to land use planning decisions made by local government.

1.3 Defining Climate Change Adaptation and Climate Change Risk

The IPCC's 2018 Special Report (p. 70) defines adaptation to climate change, as follows:

> 'Climate change adaptation refers to the actions taken to manage the impacts of climate change (IPCC, 2014b). The aim is to reduce vulnerability and exposure to the harmful effects of climate change (e.g., sea level rise, more intense extreme weather events or food insecurity). It also includes exploring the potential beneficial opportunities associated with climate change (for example, longer growing seasons or increased yields in some regions). Different adaptation pathways can be undertaken. Adaptation can be incremental, or transformational, meaning fundamental attributes of the system are changed (IPCC 2018 Special Report, Ch 1, p.70) and while climate change is a global issue, impacts are experienced locally. Cities and municipalities are at the frontline of adaptation (Rosenzweig et al., 2018), focusing on reducing and managing disaster risks due to extreme and slow-onset weather and climate events, installing flood and drought early warning systems, and improving water storage and use.'

The IPCC Special Report (2018) identifies the importance of multi-level governance in implementing pathways to reach the goal of keeping global warming below a 1.5-degree increase. The important role of local government in achieving this goal is highlighted, and the necessity for strategies underpinned by 'well-functioning legal frameworks to be in place, in conjunction with clearly defined mandates, rights and responsibilities to enable the institutional capacities to deliver' (IPCC 2018 p. 360).

Article 7 of the United Nations Framework Convention on Climate Change (UNFCCC) (2016) states that the global goal for adaptation involves a tripartite approach of 'enhancing adaptive capacity, strengthening resilience and reducing vulnerability'. There is a range of tools and mechanisms that can be employed by government, private sector, and individuals to manage legal risks associated with climate change impacts (Godden et al. 2013). There is more recently a body of literature that considers climate change risk in specific categories, including with respect to private sector decisions (Hutley and Davis 2016) and that of public authorities (Dibley, Hurley and Sheppard, 2019). This has spurred the consideration of more active decision-making by many sectors, including corporate regulators such as the Australian Prudential Regulatory Authority (APRA).

Climate change risks now widely agreed as including physical risks (i.e. impacts to property or business due to extreme or sudden events), and transitional risks (i.e. the effect of law, policy, or litigation, or other market changes as economies transition to renewable economies). For local governments, the consideration of climate change risk cuts across most of their regular activities. For example, local governments are planning authorities; they own and manage assets that are affected by climate change risk; engage in contracts for new infrastructure and associated assets (for example, roads and transport); in some instances, manage waterways and other ecosystem services; and contribute to emergency management and natural hazard reduction efforts.[2]

1.4 Structure of this Report

Section 2 of the report provides a legislative review of local government decision-making in the context of climate change risk, adaptation, and law under Victorian law, as determined by the scope of this project. Though not an exhaustive review, other legislative frameworks (in particular those that create 'duties of care' under which climate change risk responses may arise) are also discussed. A case law analysis supplements this framing.

Section 3 of this report discusses the local government consultation workshops. It includes an analysis of the challenges and opportunities that were identified during the four workshops, which included 78 local government representatives from 22 different local governments and four Victorian localities and also some representatives from local government associations and other interested agencies.

Section 4 outlines how the analysis of the consultation workshops has informed the development of the guidance brief. The guide for local government decision-makers aims to encourage decision-makers to stand in a 'reasonable persons' shoes as they consider climate change risk in a climate change adaptation context.

The legislative review, the lens of 'reasonable person', and the key themes emerging from the local government workshops all informed the development of DELWP's Guidance Brief. The DELWP Guidance Brief is intended to provide useful information drawn from this research project to improve decision-making processes within local government regarding climate change adaptation.

Section 5 details the report's conclusion.

[2] Emergency management and natural hazard responses were specifically excluded from the scope of this research at the request of the funder.

2. Legal Frameworks for Managing Climate Change Risk

The importance of law in managing climate change risks and in enabling climate change adaptation cannot be understated. Government can use law to set clear and specific frameworks to support good decision making, to play a coordinating role, to demonstrate leadership, and to manage 'whole-of-society' risks. For example, government can prescribe legally enforceable planning and development controls to give effect to strategic land use planning that incorporates climate change adaptation. To support this, general legal principles include concepts that relate to the formulation of, and responsibility for, managing risks as between parties.

Private law is generally concerned with regulating interactions and relationships as between individuals (or entities given legal status, such as corporations), while public law governs relationships as between the individual and the state. Despite the legal delineation, these public/private categories can and often do overlap. For example, following the Queensland floods in 2011, after which a number of insurance policies were found to have competing definitions of flood, government changes to the *Insurance Contracts Amendments Act* 2012 (Cth) required insurers to use a standard definition of flood in their contracts. The APRA announced recently that it strongly encourages that publicly listed companies detail climate related financial risks in their disclosure documents (Summerhayes 2017). These are both examples of how different areas of law are responding to climate risk. Interesting discussion on public authority duties can also be found in the aforementioned (on page 8 of this report) Centre for Policy Development report (Dibley, Hurley and Sheppard 2019). These trends are important for local governments to be aware of, as they may impact on decision-making processes (for example, local government investment strategies, or private-public partnerships).

2.1 Land Use Law and Planning

Land use planning is set out by a legislative framework, informed by various other regulations and guidelines. Because of the ability of land use planning to incorporate an array of collective interests and require action across various spatial, temporal, and governance scales, land use planning is considered well positioned to facilitate adaptation (Hurlimann and March 2012).

Land use planning can also interact with the private sector to encourage change. For example, the 2012 Australian Productivity Commission's inquiry, *Barriers to Climate Change Adaptation,* found that the role of the insurance sector was critical in driving adaptation. There is a clear role for land use planning to work with private sector actors such as the insurance sector. This is particularly important because planning law proscribes activities via planning instruments (such as zoning, strategic plans and policy, development approvals, and other activities as prescribed by legislation), provides mapping information (such as NARCLiM, a New South Wales based climate data platform), and other building controls. Land use planning laws, regulations, and policies also play a significant role for infrastructure and flood planning as they determine zoning of land and the type and nature of built infrastructure that is permitted on it. Where development is ill-conceived in terms of location, structure, and/or materials, and property is damaged or lost in an extreme weather event, it may carry with it legal risk. Where the insurance sector does not or cannot provide insurance, affected persons or entities may seek other remedies for their loss, including through the legal system.

It has been said that a 'reasonable person', in their ordinary decision-making processes of considering Ecologically Sustainable Development (ESD), would be required to consider climate change as an element of ESD principles (*Walker v Minister for Planning* (2008) NSWCA 22). Other recent court cases detail how a decision-maker can consider how climate change and planning decisions including development consent interact. For example, in *Gloucester Resources Limited v Minister for Planning* [2019] NSWLEC 7 (the 'Rocky Hill' decision), a case about the approval of a coal mine in New South Wales' Hunter Valley, Chief Justice Brian Preston found that a coal mine ought not be granted development approval. At par 699 of the judgment, he states:

> *In short, an open cut coal mine in this part of the Gloucester valley would be in the wrong place at the wrong time. Wrong place because an open cut coal mine in this scenic and cultural landscape, proximate to many people's homes and farms, will cause significant planning, amenity, visual and social impacts. Wrong time because the GHG emissions of the coal mine and its coal product will increase global total concentrations of GHGs at a time when what is now urgently needed, in order to meet generally agreed climate targets, is a rapid and deep decrease in GHG emissions. These dire consequences should be avoided. The Project should be refused.*

Rocky Hill has since been subject to a number of legal analyses, and is seen as a landmark case for how the courts may consider climate change impacts as a result of a land use planning decision, as well as detailed planning law principles (the wrong place, wrong time synopsis being firmly grounded in land use planning principles).

In addition, at par 536, he noted that a development approval would be inconsistent with state policy. While this was not central to his decision, it is important to observe his comments. The same point was made more generally in the *Taip v East Gippsland SC* [2010] VCAT 1222 decision, where that tribunal made several important observations as to the relationship between state and local government. In that case, the local government's decision to defer a decision that it had been specifically mandated by the state to undertake was reason enough to make an order setting aside a council's development approval decision. This strikes to the core of state and local government responsibilities and effective partnerships in areas of law and policy that do require clear state guidance – such as that of climate change.

There is emerging scholarship that explores the scientific basis of attribution of climate risk, which indicates that there is a clearer linkage between the causes of climate risk and the damage incurred as a result of a changing climate. This is potentially relevant to causes of action in negligence as well as land use planning decisions (Marjanac and Patton 2018; Marjanac, Patton and Thornton 2017).

Additional case law illustrates well an important consideration, which is that whether or not legal liability will arise depends entirely on the specific facts of individual cases. For example, in *Gippsland Coastal Board v South Gippsland Shire Council (No 2)* [2008] VCAT 1545, it was held that the precautionary principle requirements were 'sufficiently broad to include the influence that climate change and coastal processes may have on the proposed developments'. It was on this basis that the risk of impacts of sea level rise to the proposed residential development was unacceptable. The decision in *Gippsland* is significant in that it was the first Australian merits review decision to use climate change impacts as a ground for the refusal of development consent, in the absence of specific legislative provisions making consideration of the issue mandatory. In *Northscape Properties Pty Ltd v District Council of York Peninsula* [2008] SASC 57, the Supreme Court of South Australia refused consent to a coastal

development, having regard to the relevant development planning policy, which specifically required consideration of sea level rise by 110 centimetres by 2100. In a Queensland case, the courts refused a high-risk coastal development by also applying the relevant statute: *Rainbow Shores Pty Ltd v Gympie Regional Council* [2013] QPEC 26 at paragraph [360].

Tort Law

General negligence principles can result in civil action between individuals, between government(s) and individuals, between individuals and corporate entities, and often a combination of all three. Under tort law principles at common law, government is usually held to a higher standard, particularly if the duty relates to operational procedures/activities within governments (*Pyrenees Shire Council v Day* (1998) 192 CLR 330). Of relevance to local government, the provision of publicly available information, such as site-specific data mapping, may give rise to a cause of action in negligence where that information is relied upon by a person or entity and where they suffer foreseeable harm as a result of this reliance (*L Shaddock & Associates Pty Ltd v Parramatta City Council* (1981) 150 CLR 225).

Negligence claims may arise from a failure in law to do what a reasonable person would have done in the circumstances. Three main elements of negligence must be satisfied: the defendant must owe a duty of care; the defendant must have breached that duty; and the plaintiff must have suffered damage or loss as a result of that breach. In the context of climate change, liability may also arise where decision-makers have expert information and ignore it (Bell, 2014).

In the Victorian context, under the *Wrongs Act 1958* (Vic) it is important to identify the specific 'duty' that local government has. Public authorities make decisions in varied circumstances: in some cases with an absolute duty, other times with wide discretion, and in other situations still, decisions are made in pursuit of 'aspirational duties', a duty that is somewhere in between (these 'absolute' and 'aspirational' categories being particularly relevant: consider *South East Water Ltd v Transpacific Cleanaway Pty Ltd* [2010] VSC 46).

Liability in negligence will always be determined by the facts of a particular case, which is why it is important for local government to obtain independent legal advice if or where there is any doubt or questions arising about climate change risk or impacts within a decision making process.

Corporate Law

Shifts in corporate law have enabled bolder private sector responses to climate change risk. In late 2016, publicly released legal advice from Noel Hutley Senior Counsel advised that directors who fail to consider the impact of foreseeable climate change risks on their business could be held liable for breaching the duty of due diligence and care they owe to the companies under the *Corporations Act 2001* (Cth). This breach may occur by, for example, failing to disclose climate risk in financial disclosure documents.

Geoff Summerhayes, the Chairman of APRA [as at 2019], gave a speech to the Insurance Council of Australia Annual Forum in 2017. His observations there were that climate related risks are now relevant and important for all APRA-regulated entities (including insurers), and that many climate change risks are financial in nature and therefore are 'foreseeable, material and actionable now' (Summerhayes 2017). This commentary is also relevant to the corporate

sector more broadly (Peel et al. 2017; Barker and Winter 2017; Debelle 2019; and Hutley and Davis 2016).

As foreshadowed earlier, with climate change risks now widely agreed as including physical risks (i.e. impacts to property or business due to extreme or sudden events), and transitional risks (i.e. the effect of law, policy, or litigation, or other market changes as economies transition to renewable economies), companies are increasingly facing the risk of litigation. This may also have flow-on effects for local government where infrastructure or assets are managed, funded, or otherwise under the purview of private entities. Directors' duties for some government authorities was specifically considered by the Centre for Policy Development in its January 2019 report, wherein they found that similar legislative duties existed for both public and private boards of directors. It was also noted that there were significantly different consequences for directors that fail to consider climate change in decision-making, depending on which body they oversee (Dibley, Hurley and Sheppard 2019)

2.1 The Approach to the Legislative Review

The legislative analysis undertaken in this report derives from two central pillars: statutory interpretation and case law analysis. Statutory interpretation is undertaken according to the framework set out in the *Interpretation of Legislation Act 1984* (Vic). This process assigns meaning to the words in the statute according to their purpose, and to the context in which they appear.

The legislative review, especially when reviewed against the consultation workshops, highlighted several important considerations for local government roles and responsibilities for climate change adaptation. These include:

- Who is the decision-maker to which the duties apply? This is not always clear, and the complexity of the legislative frameworks make it difficult for local government, particularly under-resourced councils, to meet basic climate change adaptation requirements.
- Many explanations of what is expected of local government are (perhaps unnecessarily) overly complex, and sometime work in competing ways. This complexity makes it very difficult to clearly identify all the roles and responsibilities of local government, and even more difficult for them to implement them effectively.
- Local government needs to be properly supported by the state to achieve the goals of the Climate Change Act and related instruments, both financially and with appropriate guidance from policy.
- Because of the broad nature of climate change risk, developing a risk register specifically for climate change would be a useful tool.

2.2 The Local Government Acts

The 2020 Act

The *Local Government Act 2020* (Vic) became law in Victoria on 24 March 2020. It amends the previous 1989 Act in numerous ways; this report is focussed on how the 2020 Act incorporates explicit consideration of climate change risk. Under s 8(1) of the 2020 Act, the role of a Council is to provide good governance in its municipal district for the benefit and wellbeing of the municipal community. Section 8(2)(a) states that a Council is considered to

provide ‘good governance’ where it performs its role in accordance with the overarching governance principles and supporting principles. These principles are defined in section 9 of the Act.

When considering Council’s obligation in the climate change context, several of the principles may create obligations for Councils. The use of the word ‘must’ under s 9(1) indicates that these are compulsory and not aspirational obligations for Councils to follow.
Under s 9(2)(b) Councils are required to give priority ‘to achieving the best outcomes for the municipal community, including future generations’’ and under s 9(2)(c) Councils are required to promote ‘the economic, social and environmental sustainability of the municipal district, *including mitigation and planning for climate change risks*’ (emphasis added). This indicates that climate change will become a relevant consideration in Council planning and decision-making.

Under s 9(2)(h) regional, state, and national plans and policies are to be taken into account during Council’s strategic planning. Some of these plans and policies may relate to climate change adaptation and mitigation efforts, requiring Council to further consider the issue during their strategic planning. Under s 9(2)(i) Council must ensure its decisions, actions, and information are transparent. Additional discussion of relevant aspects of the 2020 Act are detailed in the Appendix of this report.

In light of these legislative amendment and the shifts in fiduciary duties law especially with respect to climate change (discussed earlier in this report), there is now an explicit requirement that local councils, including elected officials, properly consider climate change risk.

Thinking about this in connection with the *Climate Change Act 2017* (Vic) (‘the CC Act’) , should local councils choose to create a Council pledge relating to emissions reduction, they are explicitly required to consider the policy objectives and guiding principles under s47(2) of the CC Act. With section 47 of the CC Act is primarily concerned with emissions reduction, there may be opportunity here for creating effective and efficient adaptation policy, where entities recognise that simultaneously addressing mitigation and adaptation via policy can provide numerous co-benefits.

The 1989 Act

Analysis of the *Local Government Act 1989* (Vic) was undertaken for this report prior to the passage of the 2020 Act. Highlights are included here, though the relevant Act is now the *Local Government Act 2020* (Vic).

Under s3D of the *Local Government Act 1989* (Vic), the role of a ‘Council’ (local government) was defined in the following ways:

> (2) The role of a Council includes—
> acting as a representative government by taking into account the diverse needs of the local community in decision making;
> providing leadership by establishing strategic objectives and monitoring their achievement;
> maintaining the viability of the Council by ensuring that resources are managed in a responsible and accountable manner;
> advocating the interests of the local community to other communities and governments;

> acting as a responsible partner in government by taking into account the needs of other communities;
> fostering community cohesion and encouraging active participation in civic life.

The objectives for local government, as defined in the Act, are relevant to a broader consideration of climate change. For example, s3C(1) specifies that local government must "endeavour to achieve" best outcomes for local community, and subsection (2) states councils must have regard to, *inter alia* the need to (a) promote the social, economic and environmental viability and sustainability of the municipal district and encourage (g) transparency and accountability in decision making. Key here is the word 'must', and given what is now so widely known about climate change risk, climate change certainly influences 'viability and sustainability' trajectories.

2.3 Wrongs and Other Acts (Law of Negligence) Act 2003 (Vic)

The *Wrongs and Other Acts (Law of Negligence) Act 2003* (Vic) ('the Wrongs Act') is the primary legislative vehicle by which negligence claims against government (and others) are governed. Its enactment followed a process of extensive law reform across Australia in 2001-2002. It outlines the scope of the duty of care owned by government, what happens when this is breached, and what the damages might be.

Under the Wrongs Act, local government is a 'public authority', as per s79(d). Part XII of the Wrongs Act sets out the liability of public authorities, and some of the relevant sections are worth setting out in full.

Section 83 may be relevant where, for example, data is relied upon for decision-making:

> 83. Principles concerning resources, responsibilities etc. of public authorities
> In determining whether a public authority has a duty of care or has breached a duty of care, a court is to consider the following principles (amongst other relevant things)—
>
> > (a) the functions required to be exercised by the authority are limited by the financial and other resources that are reasonably available to the authority for the purpose of exercising those functions;
> > (b) the functions required to be exercised by the authority are to be determined by reference to the broad range of its activities (and not merely by reference to the matter to which the proceeding relates);
> > (c) the authority may rely on evidence of its compliance with the general procedures and applicable standards for the exercise of its functions as evidence of the proper exercise of its functions in the matter to which the proceeding relates.

There is no specific waiver of liability where decisions are made in 'good faith' by local government, as is the case in New South Wales under s733 *Local Government Act 1993* (NSW). However, the Wrongs Act does provide some relief for public authorities by limiting the scope of statutory duties that apply to them. For example, s84(2) sets out the 'Wednesbury unreasonableness' test – a very high bar to prove in litigation – where a decision must be found to be so unreasonable that no reasonable person would have made [that decision]:

> 84. Wrongful exercise of or failure to exercise function
> (1) This section applies to a proceeding for damages for an alleged breach of statutory duty by a public authority in connection with the exercise of or a failure to exercise a function of the authority.
> (2) For the purpose of the proceeding, an act or omission of the public authority relating to a function conferred on the public authority specifically in its capacity as a public authority does not constitute a breach of statutory duty unless the act or omission was in the circumstances so unreasonable that no public authority having the functions of the authority in question could properly consider the act or omission to be a reasonable exercise of its functions.
> (3) For the purpose of the proceeding the public authority is not liable for damages caused by the wrongful exercise of or failure to exercise a function of the authority unless the provisions and policy of the enactment in which the duty to exercise the function is created are compatible with the existence of that liability.
> (4) Despite sub-section (1), sub-section (2) does not apply to a statutory duty that is imposed as an absolute duty on the public authority to do or not to do a particular thing.

Finally, s85 of the Wrongs Act specifies that local government can make decisions, and doing so will not automatically accrue a duty if one did not exist previously:

> 85. Exercise of function or decision to exercise does not create duty
> In a proceeding, the fact that a public authority exercises or decides to exercise a function does not of itself indicate that the authority is under a duty to exercise the function or that the function should be exercised circumstances or in a particular way.

2.4 The Planning and Environment Act 1987 (Vic) and Related Case Law

The *Planning and Environment Act 1987* (Vic) ('the PE Act') comprises some 558 pages and sets out the framework for decision-making on land use planning and associated strategies, development, and infrastructure, insofar as the use of land underpins these activities. It includes processes to prepare *Planning Schemes* at the state and local levels and procedures to manage application and management of *Planning Permits*. It has linkages with transport, hazard management, and emergency management responses. The *Planning and Environment Act 1987* (Vic) is not included in Schedule 1 of the *Climate Change Act* 2017 (Vic), but given its direct applicability to land use decisions, which under case law increasingly demand consideration of climate change where possible, it is a central statute for local government decision-makers.

The Minister for Planning is the 'planning authority' for the whole of Victoria and has the powers to create and amend *Planning Schemes* at state and local levels (s8). Local governments are planning authorities for their own municipal area and may be authorised to act as a planning authority in adjoining areas (ss8, 8A-B, 9). Duties for local government are set out in s12.

The planning system established under the Act is interlinked with other legislation via the *Victoria Planning Provisions* (DELWP 2019) (the standard template for all Planning Schemes), or by specific provisions within the *Planning and Environment Act 1987* (Vic) (for example, s55 which facilitates referral to other authorities, which in practice includes coastal matters).

A sequence of decision-making structures and policies informs planning decisions beyond the Act, including those developed and deployed under the PE Act. Relevant considerations for planning decisions made within the planning systems may include:

- *The Planning and Environment Act 1987* (Vic)
- Planning and Environment Regulations
- Ministerial Directions
- *Victoria Planning Provisions* (DELWP 2019), including the *State Planning Policy Framework*, and other strategic policy (which include land zoning specifications)
- Local government strategies and policies, where incorporated into planning schemes, including in the *Local Planning Policy Framework*

Section 60 of the PE Act sits within Part 4 (Permits), the part of the Act that is concerned with decision-making processes as applicable to land use. Legal judgments have determined that s60 contains within it a 'public interest test' (refer to the case law section below for a full explanation of this term), that relates to 'any significant effects which the responsible authority considers the use or development many have on the environment or which the responsible authority considers the environment may have on the use or development'. Subsection 60(e) enables a full consideration of issues that may be under Ministerial consideration, even if not yet formally part of the planning scheme. It is not read in isolation of the remaining section: s60(1) of the PE Act states that a responsible authority must consider *all* the subsections before deciding on an application (emphasis added).

Reading s60(1) against s60(2) is important, as s60(1A) sets out a list of things that a responsible authority 'may' consider. The difference between *may* and *must* is important – must means it is required, may means it is not required but can be considered. For example, a planning decision *may* consider 'any other strategic plan, policy statement, code or guideline which has been adopted by a Minister, government department, public authority, or municipal council' (60(1A)(g).

It is theoretically possible that 'any other strategic plan…etc' could encompass climate change considerations, thereby bringing climate risk into a 'reasonable person' decision-making frame. This possibility is well supported by recent developments in broader legal categories around climate risk generally as elucidated above. The use of the word 'may' sets a different standard than the more specific requirement under section 17 of the *Climate Change Act 2017 (Vic)* which requires that the decision-maker 'must' consider climate change. Regardless, as the case law discussion throughout this report details, there are now ample enough grounds to require land use planning decisions to have appropriate regard to climate change risk, depending on the individual circumstances surrounding the particular decision.

The *Planning and Environment Act 1987* (Vic) requires the preparation of planning schemes that 'may make any provision which relates to the use, development, protection or conservation of any land in the area' (s6(1)(b)). The form and content of planning schemes are specified by the *Victoria Planning Provisions* (s4A DELWP 2019). These provisions include state policies that are to be considered in all planning decisions, and these state policies include explicit references to climate change. Examples of this include: Clause 13.01 of the *Victoria Planning Provisions* which includes natural hazard and coastal erosion considerations in planning decisions; Clause 11.03 which requires proposals for, and the planning of, urban growth areas to respond to climate change; Clause 14.01 which seeks to support agricultural adaptation to climate change; and Clause 19.3 which requires consideration of climate change in integrated water management.

There are also some local municipal policy examples which identify climate change adaptation as a priority. These are contained either within a specific *Local Planning Policy Framework* or

in the specific application of planning controls designed to respond to climate change adaptation need. For example, Clause 21.03 of the *Port Phillip Planning Scheme* recognises the need to design buildings and infrastructure for a changing climate (DELWP 2019), and Bass Coast Amendment C082, approved in 2016, includes amendments to local policy as well as the application of the *Land Subject to Inundation Overlay* to areas of identified sea level rise risk.

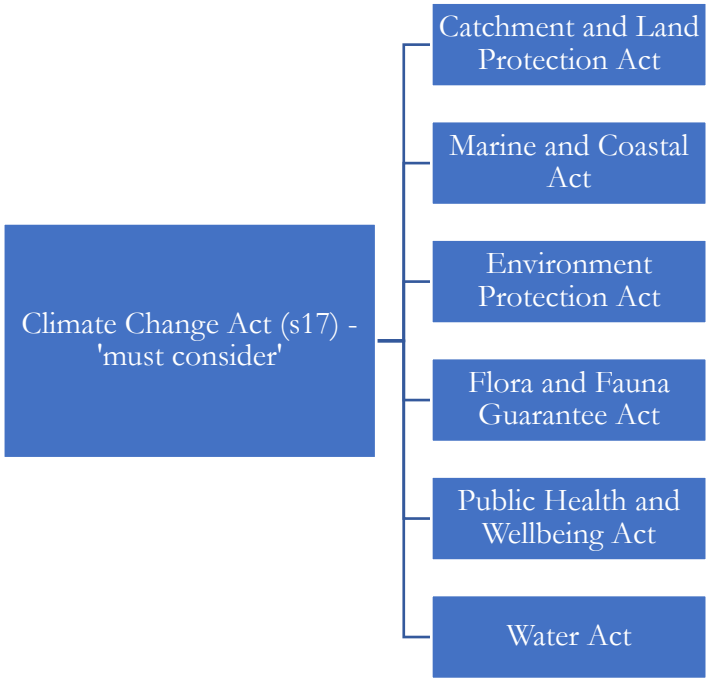
2.5 Responsibilities under the Climate Change Act 2017

The *Climate Change Act 2017* (Vic) ('the CC Act') has been heralded as a leading subnational government example of an integrated approach to the challenges posed by climate change. The CC Act addresses both mitigation and adaptation, and following a review, amended provisions to include feedback from the 2015 *Independent Review of the Climate Change Act 2010* (Wilder, Skarbek and Lyster 2015). Most duties relevant to climate change adaptation as identified in each of the Acts listed in Schedule 1 of the CC Act have the Minister as the relevant decision-maker, with minimal explicit responsibilities for local governments. In this regard the consideration of climate change under the CC Act is made explicit by the words of section 17, which states: 'decision-makers must have regard to climate change'.

Subsections of the CC Act detail the range and type of decision-maker and explain relevant considerations for a decisionmaker. Specific decisions and actions in other Acts which require consideration of climate change are listed in Schedule 1. The project team was specifically asked by DELWP to exclude the review of emergency management and other hazard legislation in this project. These emergency management frameworks have a direct bearing on climate change adaptation and responses to risk, and ought to be considered in combination with the below legislation, if the intent is to ensure a holistic decision-making process.

Many of the Acts listed in Schedule 1 of the *Climate Change Act 2017* (Vic) also outline requirements for public institutions (for example, the Regional Catchment and Land Protection Board under the scheduled s13 *Catchment and Land Protection Act 1994* (Vic)). These Boards may also be subject to further rules as to climate change risk disclosure. Notably, the *Planning and Environment Act 1978* (Vic) is not included in Schedule 1 of the *Climate Change Act 2017* (Vic) even though it has a direct bearing on local government roles and responsibilities.

Figure 1: Climate Change Act (2017) and Schedule 1 Acts



Part 4 of the CC Act makes clear that state government responsibilities to make the inclusion of 'policy objectives' (see s22 below) and 'guiding principles' (see ss23-28 below) are a routine consideration in government decision and policy-making throughout Victoria. Section 20 of the CC Act specifies that: 'The Government of Victoria will endeavour to ensure that any decision made by the Government and any policy, program or process developed or implemented by the Government appropriately takes account of climate change if it is relevant by having regard to the policy objectives and the guiding principles.' This is important to note, because local government policy needs to be consistent with the state, in line with case law as discussed earlier this report.

Section 22 lists what the 'policy objectives' to be considered are, which include mitigation and adaptation considerations. These are considered as a whole, as indicated by the word 'and' after each objective:

(a) to reduce the State's greenhouse gas emissions consistently with the long-term emissions reduction target and interim emissions reduction targets; and
(b) to build the resilience of the State's infrastructure, built environment and communities through effective adaptation and disaster preparedness action; and
(c) to manage the State's natural resources, ecosystems and biodiversity to promote their resilience; and
(d) to promote and support the State's regions, industries and communities to adjust to the changes involved in the transition to a net zero greenhouse gas emissions economy, including capturing new opportunities and addressing any impacts arising from the need to reduce greenhouse gas emissions across the economy; and
(e) to support vulnerable communities and promote social justice and intergenerational equity.

Sections 23-28 of the CC Act list the guiding principles, summarised in Table 1.

Table 1: Summary of guiding principles under Part 4 of the *Climate Change Act 2017* (Vic)

Principle of Informed Decision-Making	Under s23(a), a decision-maker (whether in local government, state government or a public authority) must consider the 'best practicably available information about the potential impacts of climate change'. Section 23(b) of the Act also requires the decision-maker to consider how the relevant decision will contribute to the State's greenhouse gas emissions.
Principle of Integrated Decision-Making	Under s24, the decision-maker must also 'integrate' 'long-term, medium-term and short-term environmental, economic, health and other social considerations relating to climate change' into their decision. This is to ensure that all relevant issues (outlined under s24(a); 24(b) of the Act) are considered, so as to achieve 'cost effective' and 'proportionate' solutions to such competing demands (as per s24(c) of the Act).
Principle of Risk Management	The decision-maker should try to 'avoid, wherever practicable, serious or irreversible damage resulting from climate change' (s25(a)); should carefully weigh the consequences of each option (s25(b)); and should endeavour to pursue 'best practice' when managing and allocating risks (s25(c)).
Principle of Equity	The decision-maker should consider the needs of the future generations (s26(2), (c), (d)), especially those most vulnerable to the potential impacts of climate change (s26(b)).
Principle of Community Engagement	The decision-maker should involve the community – especially 'vulnerable or marginalised' communities – in the decision-making process by providing them with 'appropriate information', (s27(a)) opportunities to be involved (s27(b)) and adequate consultation (s27(c)).
Principle of Compatibility	The decision-maker should consider the need for coherency and cohesion with other policies, programs, initiatives, standards, and/or commitments throughout the States, Territories, Commonwealth, and other relevant countries or international bodies and organisations (s28).

While in most instances under the Acts in Schedule 1 of the CC Act the primary decision-maker is a Minister, considerations for local government remain. The need for consistency with state policy and the potential for the State Government to rely on local government documents is also to be noted. In such circumstances, local councils, stepping into the shoes of a 'reasonable person' can assist them to prepare robust and consistent climate change adaptation policies and processes.

In addition to these state government responsibilities, local government may be working in areas that connect with the Acts noted in Schedule 1 of the CC Act. Consideration of these may inform documents or other materials relied on by State Government or the Minister. This is provided for general illustrative purposes only, and questions regarding individual legal obligations would benefit from specific legal advice for those question(s).

The only Act in Schedule 1 of the CC Act that explicitly details a local government responsibility is the *Public Health and Wellbeing Act 1988* (Vic), which requires local government to have regard to climate change in line with s17 of the CC Act when preparing municipal health and wellbeing plans.

There are other considerations for local government to be aware of in the context of climate change adaptation and under the Acts in Schedule 1 of the CC Act. Under the *Marine and Coastal Act 2018* (Vic), local government are involved in the development of regional and

strategic partnerships. These partnerships must be consistent with the *Catchment and Land Protection Act 1994* (Vic). Local government may also have responsibilities relating to the management of Crown land, which in turn could by relied on by a decision-maker, while under the *Water Act 1989* (Vic), councils have a number of responsibilities. In the context of adaptation, this might include responsibility for the planning of appropriate drainage and flow of water.

Part 5 of the CC Act outlines the steps necessary to create and publish a '*Climate Change Strategy*', required every 5 years under s29(2). This strategy is comprised of: a statement of priorities, an adaptation component, and an emissions reduction component (s30(1)).

There are several matters that the Minister must consider when preparing the *Climate Change Strategy*, (s31) as well as consultation (s32) and publication (s33) requirements. Where nominated, a Minister(s) must prepare '*Adaptation Action Plan(s)'* and '*Emissions Reduction Pledge(s)*', as per the specifications in Division 2 and 3 of the CC Act.

Local government plays a clear role in the development of Adaptation Action Plans, and is likely to be directed by the 'statement of the roles and responsibilities of the Government of Victoria and other government' (s35(1)(a)). The content of the Climate Change Strategy – informed by the Adaptation Action Plans and Emissions Reduction Pledges – will be important to local councils for several reasons, detailed in Table 2.

Table 2: Relevance of the *Climate Change Strategy* for local government and climate change adaptation

Importance of Climate Change	The *Climate Change Strategy* emphasises climate change as an important factor in future decision and policymaking. By setting out the medium and long term objectives and strategic priorities for climate adaptation across Victoria, the *Strategy* can provide justification and motivation for local governments to include these considerations in their decision-making processes.
Relevant Information	The *Climate Change Strategy* will likely contain guidance from the state government that will influence local government policy. It will also contain relevant information that, under the policy objectives (outlined in s22 above) and guiding principles (outlined in ss 23-28 above), should be included in decision and policy-making process. For example, s30(3)(a) of the Act requires the 'adaptation' component of the *Climate Change Strategy* to contain 'a summary of the most recent climate science report,' and an annual greenhouse gas emissions report. Such information may be relevant to local government where they are preparing an emissions reductions pledge, in using the 'best practicably available information about the potential impacts of climate change' under the principle of informed decision-making (outlined above, under s23(a)).
Community Involvement and Publication	Both the adaptation and the emissions reduction components of the *Climate Change Strategy* have certain consultation requirements that must invite comment from the public (s32, 37) and must contain 'information about any other proposals from the business sector or wider community attempting to reduce greenhouse gas emissions…' (s30(4)(f); s35(2)(b)). This is relevant to local government who work with communities on the frontline of the potential impacts of climate change and could be instrumental in guiding community complaints, feedback, and the like into such submissions.

3. Local Government Consultation Process and Findings

3.1 Engagement Method and Purpose

In the context of the detailed legislative analysis provided above, the Project Team developed a series of workshops for local government decision-makers, which took place across Victoria in 2019. There was a concerted effort to reduce the more technical legal language into a format that would enable shared learning and effective community consultation.

The community consultation process comprised four workshops with local government participants from a varied range of professional roles. Workshops were located across Victoria in order to enable the participation of as many local councils as possible. The consultation workshops enabled direct engagement with 78 local government staff and representatives from other organisations such as the Municipal Association of Victoria and the Victorian Local Government Association. We had two priorities: first to assess key challenges in decision-making for climate change adaptation, and second to enable user input to designing information and guidance for local government decision-makers. These priorities were set against our broader aim, which was to analyse the legal frameworks and explore with local governments how decision making could properly consider climate change risk.

The four workshop locations spanned coastal and inland regions as well as irrigation farming and metropolitan growth areas. Each was chosen to gather clusters of local government with a range of experiences in climate change adaptation and varied resources to support decision-making. These differences allowed an understanding of the range of challenges and capabilities present in local government, which vary widely in size and resources across Victoria.

Warrnambool Workshop

The Warrnambool workshop, held on 12 March 2019, included eight staff from the local governments of Warrnambool City Council, Glenelg Shire, and Corangamite Shire. Staff roles included engineering, planning, and corporate services. Each of these municipalities includes coastal, urban, and rural areas. In the Warrnambool area, several recent and historical decisions about urban development, coastal subdivision, coastal protection infrastructure, and other similar matters have received considerable local attention, and as such, local government are familiar with the associated risks and hazards.

Melton Workshop

The Melton workshop, held on 13 March 2019, included 15 local government staff from Melton, Brimbank, Hume, and Wyndham City Councils. Staff roles included legal services, planning, environmental management, engineering, and land use planning. Each of these municipalities have experienced rapid population growth and urban expansion into greenfield development sites. They each have significant relationships with other urban development agencies and work together in delivering this urban growth, often responding to decisions made by state government and other agencies. These urban development agencies include the Victorian Planning Authority (VPA), water authorities, and VicRoads. The workshop discussions included a focus on the issues related to urban growth, especially in relation to land use planning, infrastructure development, and the provision of Council assets in growing communities.

Echuca Workshop

The Echuca workshop was held on 14 March 2019. It included 25 participants from Campaspe, Gannawarra, and Moira Shires, and the Rural Cities of Wodonga and Shepparton. Staff roles included engineering, corporate risk, environmental management, and land use planning. While the discussions were wide ranging, some key themes emerged in relation to urban and rural flooding, relationships with other agencies (such as rural water authorities), and decision-making for resource-constrained local government.

Melbourne (Central and South East Suburbs) Workshop

The Melbourne workshop was help on 15 March 2019 and had the widest range and greatest number of participants (30). Participants included staff from 10 inner, middle, and outer suburban municipalities, as well as representatives from local government associations and alliances. Participants' roles included land use planning, environmental management, legal and risk management, engineering, and community service provision. The issues raised were wide ranging and focussed strongly on internal procedure, risk management, and knowledge development, rather than any specific climate adaptation issue, although examples such as sea-level rise and urban heat were mentioned frequently in discussions.

Each workshop was conducted over three hours and involved three stages:

1. An introduction to the project aims and objectives. This involved an outline of the *Climate Change Act 2017* (Vic) and its relationships with other key legislative and decision-making responsibilities for local government.
2. Discussions and the scribing of participant perspectives on key challenges and opportunities for local government under climate change adaptation.
3. A discussion and the scribing of approaches to mechanisms for assisting in decision-making. In small groups, participants worked together to provide pathways to decision-making and identify further areas of local government guidance. The results of these discussions have been incorporated into this project's guidance brief.

3.2 Findings

The workshops coalesced around a series of key themes relating to key challenges and opportunities for local government under climate change adaptation, as well as the design of guidance materials. These are outlined below.

Challenges and Opportunities

The workshop session asked participants, firstly in groups and then collectively, to identify and articulate the challenges and opportunities presented by the *Climate Change Adaptation Plan* (2017-2020) and legislation across the range of areas of local government decision-making. The identified challenges and opportunities include:

1. Concern at the lack of clarity in some legislative frameworks and relevant legislation for local government decision-making for climate change adaptation. This included the need for clear understandings of the responsibilities of state and local government and other agencies, as well as the relationships between them.

2. A need for clear and useable data to assist with specific and required decision-making tasks.
3. A need for clear approaches to recording and reporting decisions (potentially as a form of 'risk register') and the opportunities that legislation can offer for creating certainty in including climate change risk as a decision-making issue.
4. A need for clear methods and approaches to communication within local government and with the public about these issues and the increasingly significant role that the public plays in decision-making within the organisation of local government and as a regulatory agency.
5. Managing resources and capacity at an institutional level to include new considerations emerging from climate change adaptation responsibilities and the inequities this presents for smaller, under resourced (particularly rural) local government.
6. The need for further legislative reform, such as including an explicit climate change adaptation agenda in the *Planning and Environment Act 1987* (Vic).

Design of Guidance Materials

In each workshop, the participants were asked to work in small teams to develop mechanisms for delivering responses to the opportunities and challenges summarised above. These were often well-developed and presented as both highly procedural pathways for decision-making and frameworks for obtaining, sharing, and using information to allow better decisions for climate change adaptation. The key need identified were:

1. Policy and decision-making templates, checklists, or flow-charts to support decision-making under various scenarios and for different roles in local government.
2. Guidance on the prioritisation of responses to various risks and hazards in decision-making.
3. Guidance on making reasonable decisions under information and resource constraints and varied community expectations.
4. Guidance on data quality and dependability in various decision-making regimes.
5. Approaches to recording and reporting climate change adaptive responses in infrastructure provision, financial management, and regulatory decision-making responsibilities.

4. Guidance for Local Government Climate Adaptation Policy

This section provides a synthesis of the concepts and ideas shared in the workshops for how to develop and frame guidance in local government climate adaptation policy. Participants brainstormed contextual and operational concepts relating to specific issues in decision-making and management.

4.1 Policy and Decision-Making Templates

Participants expressed a need for:

- Basic criteria for adaptive decision-making, informed by standardised and consistent data.
- Clarity around how responsibilities are allocated across different tiers of government and other agencies.
- A framework outlining how to develop an adaptation plan and how to incorporate climate change in asset planning.
- Support to develop decision-making pathways or process-flows to guide decision-making against various possible scenarios.
- Clarity on the role of legislation in decision-making processes.

Suggestions around the design and type of supports and tools needed to enable decision-making highlighted the value of templates or 'decision pathways' to guide adaptive decisions and investments in differing scenarios. In this regard, participants cited as a useful example the Cultural Heritage Management Planning system developed by the Victorian state government to guide local authorities. In this system, guidelines for cultural heritage planning are provided, as well as checklists and templates to inform local government of methods for planning and the appropriate processes and actions. Similarly, participants suggested that 'process-flows' in common decision-making activities might be useful, particularly when key decision-making points are identified and different thresholds for consideration apply.

These examples also emphasised the need to offer clear advice on legislation that reflected the links and boundaries between the multiple roles that local government can play.

4.2 Prioritisation of Responses to Specific Risks and Hazards

Participants expressed a need for:

- The development of models for determining and weighting priorities, risks, and impacts.
- Local government struggles to understand climate risk and reasonable decision-making in their day-to-day processes.

Workshop participants sought approaches to understanding and weighting relative risks and priorities, with a particular focus on how to gauge future liabilities and change local government plans accordingly. The participants suggested approaches should allow risk and impact considerations to be understood and communicated within and beyond local government (i.e. to their communities and stakeholders), especially where this would result in changing 'business-as-usual' approaches to decision-making. This highlighted the need to

ensure support and buy-in from communities and stakeholders as local government plans for and manages climate risks.

4.3 Making Reasonable Decisions Under Varied Information and Resource Contexts

Participants expressed a need for:

- Authority and capacity of local government managers and officers to document good decision-making processes.
- An evidence-based risk profile.

Several participants spoke to a need for guidance on how to apply the concept of a 'reasonable person' in decision-making. The idea of acting reasonably, and being able to articulate that stance, was a core issue for participants who were aware that their own decision-making was shaped by their current levels of knowledge and the varied capacity and resources of different local governments. Discussion aimed to build awareness that actions and decisions should be documented with adequate evidence to prove they were made on the basis of informed and reasonable decision-making that was relevant at the time given the information available.

4.4 Guidance on Data Quality and Use

Participants expressed a need for:

- Up to date data and analysis of current and ongoing changes in regionally specific climate science data and mapping of risks against future scenarios to better support local government decision making.
- Support for local governments to interpret, communicate, and use relevant and valid data sources, standards, and methodologies to guide decision-making.

The need for guidance on appropriate data for decision-making was a common theme across all workshops. Many participants desired guidance on which data to use and how confident users should be in its use. Central to this conversation was the notion that data (particularly in planning) has two roles: as evidence for decision-making, and as a trigger for assessment. In both instances, local government requested guidance from state government to assess the reliability and timeliness of climate change data, including spatial data such as flood records. Similarly, local government requested assistance in developing approaches to decision-making when data is not timely, reliable, or available.

4.5 Approaches to Recording and Reporting Decisions

Participants expressed a need for:

- Accountability in reporting within local governments and where appropriate to state government and other relevant authorities (i.e. how well has local government covered off on its requirements).
- Support in managing issues of disclosure of data, for example where there are third party owners of data.
- An introduction of annual reporting on climate change adaptation as mandated for local government and state government. This would need to be well supported and streamlined.

Participants sought guidance on how local government could record and report decisions and actions. Furthermore, guidance was sought on approaches to designing and managing a 'risk register' for decisions made with climate change adaptation intent, both to record the considerations and evidence used and to consider the suitability of decisions over time with changing awareness of risk profiles. It was recognised that this risk register could comprise a newly designed recording system, or including new information into existing record-keeping (including evidence in documents such as planning permits and delegates reports). This could occur at state or at local government levels.

5. Conclusion

5.1 Key Findings from the Legislative Review

There is no mention of 'climate' or 'climate change' in the *Planning and Environment Act 1987* (Vic), nor is the PE Act listed in Schedule 1 under the *Climate Change Act 2017* (Vic). This raises potential inconsistencies with respect to land use decision-making, and the intention of the *Climate Change Act 2017* (Vic), as well as the operation of its scheduled Acts, where land use and climate change adaptation factors intersect. The reviewed legislative framework (when including the *Planning and Environment Act 1987* (Vic)) shows some discrepancies as to when climate change *must* be considered, as opposed to *may* be considered, causing uncertainty about appropriate responses from relevant decision-makers. This is somewhat alleviated by the inclusion of section 9 *Local Government Act 2020* (Vic).

5.2 Key Findings from Consultation with Local Government

The key challenges and opportunities identified across the four local government workshops are as follows:

1. Concern at the **lack of clarity** in some legislative frameworks and relevant legislation for local government decision-making for climate change adaptation. This included the need for clear understandings of the responsibilities of state and local government and other agencies, as well as the relationships between them.
2. A **need for clear and useable data** to assist with specific and required decision-making tasks.
3. A need for clear **approaches to recording and reporting** decisions (potentially as a form of 'risk register') and the opportunities that legislation can offer for creating certainty in including climate change risk as a decision-making issue.
4. A need for clear methods and approaches to **communication within local government and with the public** about these issues and the increasingly significant role that the public plays in decision-making within the organisation of local government and as a regulatory agency.
5. **Managing resources and capacity** at an institutional level to include new considerations emerging from climate change adaptation responsibilities and the inequities this presents for smaller, under resourced (particularly rural) local government.
6. The need for **further legislative reform**, such as including an explicit climate change adaptation agenda in the *Planning and Environment Act 1987* (Vic).

5.3 Considerations in Designing Guidance Materials

The workshops also sought contributions from participants on the direction and design of guidance materials for climate change adaptation decision-making, accounting for the various roles and responsibilities of local government under legislation. The following themes and concepts emerged to help inform the development of guidance materials:

1. The concept of **policy and decision-making templates**, checklists, or flow-charts to support decision-making under various scenarios and for different roles in local government.

2. Guidance on the **prioritisation of responses** to various risks and hazards in decision-making.
3. Guidance on **making reasonable decisions** under information and resource constraints and varied community expectations.
4. Guidance on **data quality and dependability** in various decision-making regimes.
5. Approaches to **recording and reporting** climate change adaptive responses in infrastructure provision, financial management, and regulatory decision-making responsibilities.

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7. Appendicies

Appendix 1: Consultation Workshops High Level Summaries

The following provides a synthesis of the challenges and opportunities identified during the workshop series. It includes highlighted issues and an explanation of how these were raised and interpreted by participants in discussions.

Clarity in Legislative Frameworks for Local Government Decision-Making

Highlights:

- There are inconsistencies around 'must', 'may' and 'should' categories across legislation which is complicating decision-making. For example, s17 of the *Climate Change Act 2017* (Vic) states that decision-makers 'must' consider climate change while other legislation has less emphatic language.
- There is a need for clear standards and best practice from State Government to guide consistent decision-making.
- There is a need for clarity on how governance and delivery work across and between agencies, departments and local government, and how this can reflect a whole-of-government approach at both tiers.
- There needs to be transparency in resources and budgets, and funds must be linked to actions (eg. SV funds make governance and purpose explicit).
- There is a need for state support for collaborative action with resources. There is an absence of a central/shared research hub, such as the National Climate Change Adaptation Research Facility (NCCARF) or Victorian Centre for Climate Change Adaptation Research (VCCCAR).

Across all workshops there was broad agreement that the state government needed to provide clear policy directions for local government. While some policy direction was provided through planning schemes and other similar documents it was considered that there was little actual guidance on decision-making. While the federal government has been largely absent from taking responsibility in leadership on climate change, the state government has a stronger role to play. Issues like sea-level rise were highlighted as needing 'concrete' direction. For example, directing local government to 'plan for X rise by 2050 and by 2060 and so on'. Even if these standards need to change to reflect the changes in the science itself there was a call for a clear and consistent decision-making framework to direct local government in planning decisions. Mandating standards across the state was identified as an important step in reducing inconsistencies and responsibility for individual local government assessments.

Local government also raised the issue of how the lens of a reasonable person would work for permit applications in flood zones if, for example, it was not possible to define what the geographical extent of future flooding will be. The example presented was of an application that sits just outside the flood overlay. That application would not be able to be refused if local government cannot produce proof of a high-risk location at the time of the application. Where a permit is not triggered in the first place, in a residential zone with no overlay but in an area that is subject to flooding there is little that local government can do.

Other areas where there was a lack of clarity around legislation and the responsibilities of local government was in the relationship between the *Climate Change Act 2017* (Vic) and the *Public*

Health and Well-Being Act 2008 (Vic). The latter Act requires local government to prepare a municipal plan where they share responsibility with other public health providers in the area.

Participants discussed the difficulties of dealing with time lags, as decision-makers struggle to keep up with developing risk assessments and tracking up to date information and maintaining the 'balancing acts' between the myriad of competing priorities. This was a concern when discussing health and well-being planning, where local government are developing their own policies and plans prior to the release of state policies. There was concern that as the state released its own policy local governments would need to remodel their plans in response, despite having invested significant time and money in ensuring that local government had crafted a proactive policy response to the issues. This point highlighted the need for better collaboration between local and state government, particularly around the timing of policies, rather than the current system which requires reactive approaches and does not reward proactive local government.

Clarity in Decision-Making Tasks and the Need for Clear and Useable Data

Highlights:

- Land use planning must be as a mechanism for outlining clear guidance, clear standards and clear objectives responding to climate change risk.
- The need to create consistent standards that all local government must adhere to. For example, a standard response to the mapping of sea-level rise and flood level data).
- Adjusting language might be a useful means of encouraging acceptance and avoiding politicisation of climate change among the wider community.
- Local government needs access to, and clarity around the use of, reliable datasets and how to manage changing data over time.
- Local government needs to build its capacity to use and interpret data through access to expertise and resources, building internal capacity, and developing stronger relationships with other agencies – often the data owners.
- Create a centralised shared source of data and how to use it in decision-making.

All workshops identified the need for stronger legislative and procedural links between the *Climate Change Act 2017* (Vic) and the *Planning and Environment Act 1987* (Vic) as being a top priority, together with the need for leadership by state government in developing best practice standards, guidelines and policy templates. Currently, there are inconsistencies between the two statutes: the *Climate Change Act 2017* (Vic) states that climate change 'must' be considered. This is causing confusion for local government. Several workshop participants regarded the *Planning and Environment Act 1987* (Vic) as 'outdated' in its ability to respond to climate change risks and hazards.

Including the *Planning and Environment Act 1987* (Vic) as one of the scheduled Acts within the in the *Climate Change Act 2017* (Vic) was considered by participants to be important. Doing so would reinforce the need to address climate change in planning decisions, which is recognised as a critical area when considering climate change risk. Many participants highlighted that local government have advocated for the *Planning and Environment Act 1987* (Vic) to be included as a Scheduled Act under the *Climate Change Act 2017* (Vic) since the beginning. In order for local government to act 'reasonably' they need the legislative framework to enable better decision-making. For example, the Precinct Structure Planning process (for new urban fringe housing) was raised as not adequately consider climate change, making it very difficult for local government to improve design standards or impose

development conditions without the legislative backing to do so. This issue highlights the need for better collaboration between the Victorian Planning Authority and local government, as well as the need for a whole of government approach to planning for climate change.

The need for reliable and usable data was identified as a key issue in making good decisions and was highlighted across all workshops. While accessing data was considered one of the challenges, having the expertise and capacity to interpret the data was considered beyond the role of many local governments. This led to calls for greater support from those 'data owners' to participate in the decision-making process and provide guidelines on how to use data in decision-making. An example was Melbourne Water data, whose inundation modelling has been used in development decisions. The agency, in this case Melbourne Water, could present at a panel to explain how particular water levels were chosen over others. Needing reliable localised data was also highlighted as a key issue for local government. A regional approach to sharing data was identified as a useful means to building capacity and expertise across the region.

Making data usable and understandable to a wide range of decision-makers was highlighted as important, particularly if responsibility for climate change decision-making is to be shared across local government and departments. Making data understandable to Councillors was highlighted. Some local governments needed to undertake their own modelling in the absence of reliable state-based data – for example, coastal modelling and high-risk areas. This is a resource -intensive exercise that not all local government is capable of investing in.

The need for a central register of data was highlighted across all workshops. Creating a shared research and data sharing resource hub was highlighted as a positive step (particularly in the absence of NCCARF and VCCCAR) where best practice could be shared, and reliable data stored. The state government was seen as the critical actor whose participation was needed to address this gap, as local government are currently needing ''to do their own thing'' creating inefficiencies, inconsistencies, and inequities where they lack the resources to invest in data gathering exercises.

Need for Clarity on Reporting

Highlights:

- State-wide priorities for risk reporting are needed.
- Clarification of how, and who, should manage competing risks and priorities within risk management frameworks (For example Including climate resilience into guidelines for Growth Areas Precinct Structure Planning).
- A clear understanding or consistent approach to risk reporting and related training is needed.
- The state should look at building on mandatory reporting processes, what can be built into existing processes and what are new requirements.
- Potential mandatory (perhaps annual) reporting on climate change adaptation actions should be required from local and state government and other agencies.

Local government identified the need for state-wide guidance on risk reporting and prioritisation of risks. This would enable local government to elevate climate change risk priorities in their Councils and address challenges around reporting on risks within particular time-frames. For example, a participant explained how over several years they had identified 17 climate change risks in their Corporate Risk Register. While each risk was addressed and

allocated to particular people across local government (these people are the 'risk owners'), there was an issue around the long-term nature of climate change risks which makes it difficult to report on 6 monthly actions. At the time their risk manager looked at risks through the lens of 'if this likely to happen during x period' or 'is this going to cost the Council x amounts of money' and if the risks did not meet those thresholds they were not considered. This meant that many climate change risks were not considered.

This example highlights a point that came up across workshop discussions around the need to review and change the risk management framework. While responsibility for managing and responding to climate change risks and hazards is seen to be increasingly falling on local government, improving risk management is a priority. Clear directions from state government are considered necessary in order to identify and distribute the ownership of climate change risks across different agencies and local government departments. It is important that responsibility does not remain almost entirely with environment portfolios, rather the responsibility to plan for and manage risks associated with climate change must be a whole of government approach (at both state and local government levels) as indicated by the concerns raised at the project workshops about bringing these issues into all portfolio areas and ensuring support at all tiers of government.

The need for a risk register was identified as well as state guidance on risk reporting and training. One approach was to look at existing reporting frameworks in the first instance and how to modify or add to them and then assess the need for new reporting requirements. The call for a potential mandatory reporting approach to climate change adaptation was identified.

Communication and Narratives within Local Government and for the Public

Highlights:

- Support needed to develop effective narratives, communication tools and evidence for different audiences (i.e. Councillors, different parts of local council).
- A need to build the capacity of local government officers through awareness risk-based decision-making training, to equip staff with the ability to articulate decisions in various situations.
- A need for training in scenario development and description.
- A need for training local government staff to work with different audiences.
- An opportunity to improve the use of good infographics, spatial and visual concepts to better communicate impact on different areas of local government and what can be done to address risks.

Several workshop participants recognised that climate change adaptive decisions would require different decision-making logics in a number of areas, and that these needed to be communicated within local government, to elected Councillors, the community and other stakeholders with care and clarity. The capacity for communication of ideas, strategies for visualising outcomes, and techniques for making climate adaptive decisions were all raised as issues.

The development of training and capacity-building for elected Councillors, staff and community stakeholders was also identified as an important step for improving the efficacy of climate adaptive decisions. Within this, techniques to visualise futures, including scenario development, graphic and spatial communications, and other ways to present evidence in decision-making were highlighted as potentially useful tools.

Resourcing and Capacity Inequities

Highlights:

- The distribution of responsibilities overburdens local government, given the lack of resources local government has to deliver on those responsibilities.
- There are inequities around the distribution of resources, particularly between metro and rural councils.
- There is a need to develop baseline resources and funding to support local government in responding to climate change, instead of the current system of short-term grants with shifting priorities.

Participants in all workshops identified the need to build capacity in local government for expertise in climate change adaptation, and the need to allocate resources to meet the implications of new decision-making responsibilities. This was identified as particularly challenging in small rural councils, some of which have considerable, and disproportionate, exposure to issues including flood and sea level rise. This included calls for funding to be directed to support capacity building in these locations. For example, according to a workshop participant, rural coastal councils receive '20% of the coastal funding but they manage 90% of the coasts'.

Discussions included the way in which resources, capacity and knowledge held by the state government and various specialist agencies should be used and shared in local government decision-making. In particular, support should be provided to ensure these data and skills are available in strategy design and in decision-making situations.

Law Reform

Highlights:

- Local government should focus on moving away from 'fear-based' decision-making to a framework for incentivising effective decision-making.
- Inclusion of the additional, important legislation, such as the *Planning and Environment Act 1987* (Vic) in the *Climate Change Act 2017* (Vic), as well as updating the former to better account for climate change considerations
- Consideration of climate change adaptation within the new Local Government Bill 2019 (if passed, this Act will be the new Local Government Act).

The notion of making decisions through the lens of 'fear', or more broadly without confidence in decision-making frameworks, was raised at each workshop. The participants sought clarity on how the legislative environment allows them to make decisions that they deemed adaptive, supported by certainty in legislation. The ambiguity between the requirements to act differently under various legislative schemes (see above) was also discussed.

At all workshops there was a strong preference to integrate climate change adaptation into planning processes, supported by all legislation and regulatory mechanisms. Participants emphasised the inclusion of the *Planning and Environment Act 1987* (Vic) in Schedule 1 to the *Climate Change Act 2017* (Vic).

There was also some discussion on changes (currently being considered) to the *Local Government Act 1989* (Vic) (through the current Local Government Bill 2019) and how these

changes may include explicit obligations for local government to make climate change adaptive decisions and develop strategies.

Appendix 2: Additional Legislative Analysis

(Including the Local Government Act 2020 and Acts listed in Schedule 1 of the Climate Change Act 2017)

Local Government Act 2020 (Vic)
Additional considerations for local government are tabularised as follows:

8	**Role of the Council** Clause 8 'describes the role of a Council, which is to provide good governance for the benefit and wellbeing of the municipal community. The purpose of this clause is to ensure that Councils use their powers and abilities for the public benefit of their communities and in a manner consistent with good governance. Good governance is defined by subclause (2) and is achieved when a Council applies the overarching governance principles described in clause 9. The provision of good governance, through the application of the overarching governance principles is a core concept in the Bill. It defines a standard to which Councils will be held accountable and a failure to provide good governance may result in Ministerial intervention under Part 7
9	**Overarching governance principles** (which Council decision-making must be in accordance with) In particular, s 9(b) and (c)
10-11	General power (s10) and power of delegation (s11) – probably not relevant, unless there can be some link to abdicating the performance of your duties (e.g. ADJR grounds).
14	Council is body corporate (and therefore, liable to all the things a body corporate would be).
28(1)-(2)	One of a Councillor's roles is to represent the interests of the municipal community in council decision-making, considering the 'diversity of interests and needs of the municipal community' (perhaps these needs could include climate change) and complying with the standard of conduct.
55	The Council must develop a Community Engagement Policy (in accordance with the principles under s56) which they use to develop their strategic policies. The focus on giving the community relevant and timely information to inform their participation could be relevant where major works that might affect climate change adaptation / mitigation are being considered.

57	The Council must have a policy of public transparency where (in accordance with the principles under s58) withholding information is only justified where it can be proven that releasing the information would be against the interests of the public or where the information is classified as confidential under legislation. This could be relevant for the purposes of releasing flood reports, coastal management plans, catchment management plans and other studies etc. that might pertain to climate change (whether development related or not).
106(1)	'A Council must plan and deliver services to the municipal community in accordance with the service performance principles.' s106(2)(a): 'services should be provided in an equitable manner and be responsive to the diverse needs of the municipal community…' – could climate change be argued to be a 'need'?
328(1)	The Local Government Bill 2019 repeals, to the extent of any inconsistency (s358(2)), the Local Government Act 1989. However, under (s358) the LGA 1989 is to be read as a part of the LGB 2019.

Catchment and Land Protection Act 1994 (Vic)

The *Catchment and Land Protection Act 1994* (Vic) (CLPA) (for the purposes of this section of the report, this will be sometimes be referred to as 'the Act') establishes a system of regional and state-wide Catchment Management Authorities to establish integrated catchment management, including land and water management and the regulation of invasive plants and pest animals.

The primary obligation local government has under this Act is in their capacity as landowners who are required to take reasonable steps to eradicate noxious weeds and animal pests (both categories are identified under the Act) and to prevent their growth or proliferation.

Part 2 of the Catchment and Land Protection Act 1994 (Vic)

Part 2 of the Act establishes the Catchment Management Council (s6), its membership (s7), procedure (s7) and functions and reporting obligations (s9). It also establishes the regional Catchment Management Authorities (formerly Catchment and Land Protection Boards) (s10).

Each of the ten Catchment Management Authorities are responsible for drafting and implementing a *Regional Catchment Strategy*, to prepare 'special area plans' where appropriate and to engage with stakeholders during this process (s12(1)). Such *Regional Catchment Strategies* will include priorities and objectives for private and public land management, and a framework for funding priorities, including for voluntary groups such as Landcare. The *Regional Catchment Strategies* are also reference documents within *Municipal Planning Schemes* prepared under the *Planning and Environment Act 1987* (Vic).

Part 3 of the Catchment and Land Protection Act 1994 (Vic)

Part 3 of the Act outlines the general duties of landowners, including Crown land managers (which often includes local government). Under s20(1) of the Act, a landowner must take all reasonable steps to:

- avoid causing or contributing to land degradation which causes or may cause damage to land of another landowner;
- conserve soil;
- protect water resources;
- eradicate regionally prohibited weeds;
- prevent the growth and spread of regionally controlled weeds; and
- prevent the spread of, and as far as possible eradicate, established pest animals.

Part 3, at s21, specifies the duties and responsibilities of the Secretary (the head of the relevant department, as defined by s3 of the *Conservation, Forests and Lands Act 1987* (Vic)).

Under s22A(1), the Minister has the power to declare that a municipal district is a district for which a 'roadside weed and pest animal management plan' must be prepared. Sections 22A(2)-(6) outline the procedural requirements the Minister must follow to do so.

Sections 22C-22Q outline the processes local government must follow in order to fulfil their obligation outlined in 22B that they 'prepare, submit for approval and publish' such a plan upon receiving a Ministerial directive. The sections and what obligation they touch on are briefly summarised below in Figure 3.

Figure 3: Summary of Plan Preparation Process

s22C	Contents of a roadside weed and pest animal management plan
s22D	Preparation of plan
s22E	Time for preparing a roadside weed and pest animal management plan
s22F	Procedure for making a roadside weed and pest animal management plan
s22G	Minister may approve a roadside weed and pest animal management plan
s22H	Operation of roadside weed and pest animal management plan
s22I	Publication of roadside weed and pest animal management plan
s22J	Municipal council must implement plan
s22K	Variation of an approved roadside weed and pest animal management plan
s22L	Minister may request that plan be varied
s22M	Municipal council must publish varied plan
s22N	Suspension of approval of a roadside weed and pest animal management plan
s22O	Revocation of the approval of a roadside weed and pest animal management plan
s22P	Municipal council must provide information and documents to Minister
s22Q	Reporting

Part 4 of the Catchment and Land Protection Act 1994 (Vic)

Part 4 outlines the process for creating and implementing regional catchment strategies. This process is relevant to local government because, in addition to its relevance to the planning system, as land managers local government are required to take the strategy into account when carrying out a function on behalf of the Crown (s26(1)(a)). The exception is where that strategy is inconsistent with a provision of an Act (other than the CPLA itself) (s26(3)).

Part 4 also allows the Minister to declare a land as a 'special area' (s27(1)). A 'special area' declaration aims to provide solutions to unique issues that affect particular areas. Under s32, land managers are required to take such declarations into account when carrying out a function on behalf of the Crown (s32(1)(a)), unless that strategy is inconsistent with a provision of an Act (other than the CPLA itself) (s32(3)). Under s33, the Secretary can also serve a landowner with a series of land use conditions for a special area, which the owner must comply with (s35).

Part 5 of the Catchment and Land Protection Act 1994 (Vic)

Part 5 of the Act handles Land Management Notices. Where a Secretary has issued either a 'priority area notice' (establishing that area as a priority for the purposes of direction action against the relevant noxious weeds or pest animals) or a 'directions notice' (giving direction to the landowner about how to address the noxious weeds or pest animals on their land), and the landowner has failed to comply with that notice, the Secretary may instead serve a land management notice (s37). A landowner (potentially including local government as an owner or land manager) must comply with the notice and the directions within it or is liable for up to 240 penalty units for violating the offence (s41).

Under s41(3), the only exception to this is:

> A municipal council does not commit an offence under subsection (1) if, at the time the land management notice was served, there was a declaration under section 22A in effect in respect of the municipal district of the municipal council and a roadside weed and pest animal management plan was being prepared by the municipal council.

Sections 38-40 and ss41-45 outline the procedures the Secretary must follow in creating this notice, while s46 outlines the reporting obligations the landowner has to the Secretary to prove compliance.

Section 47A of the Act empowers the Minister to give a notice of declaration of a priority area (s47A), while ss47B and 47C outline the procedures the Minister must follow. If the landowner fails to take on or more of the measures specified in such a notice, or fails to do so within the specified time period, it is an offence which is punishable by up to 20 penalty units (s47D).

The exception to this is if the priority area is a roadside under local government control and there is an approved roadside weed and pest animal management plan already in operation (s47D(3)).

Part 6 of the Catchment and Land Protection Act 1994 (Vic)

If local government wishes to apply for a review of the notice of a land use condition or land management notice, they can apply to VCAT under s48.

Part 7 of the Catchment and Land Protection Act 1994 (Vic)

Part 7 outlines under what circumstances landowners or managers can carry out 'extractive activities', defined in s49 as:

> the extraction for sale or removal of soil, sand, gravel or stone or other similar material to a depth of up to 2 metres below the natural surface, if the total of the areas of the surface broken up by the extraction or removal is more than 2000 square metres.

This is largely irrelevant to local government, unless they require the Secretary's approval to undertake such extraction for construction or other similar purposes. Sections 52-56 outline how local government is able to obtain such approval, or else fall afoul of the offence outlined in s 51.

Part 8 of the Catchment and Land Protection Act 1994 (Vic)

Part 8 is relevant to local government because it defines and gives examples of 'noxious weeds' and 'pest animals.' This classification is done by the Minister (s58). Sections 58-69A outline the procedural requirements for making such a classification.

Sections 70-72 outline the power the Secretary has to give directions as to the management of weeds and pests (which local government is obligated to comply with), while ss74-75A specify three offences in relation to pest animals. It is an offence to take pest animals in areas affected by chemicals; an offence to import, keep or sell pest animals; and an offence to release pest animals.

Part 9 of the Catchment and Land Protection Act 1994 (Vic)

Part 9 is only relevant to local government inasmuch as it expounds upon the powers of 'authorised officers.' Under the definition of an 'authorised officer', provided in Part 9 of the *Conservation, Forests and Lands Act 1987* (Vic), it is possible (but not specifically contemplated within the purpose of the provision) that a local government employee could be appointed as an authorised officer by the Secretary. If this is the case, said officer will have the power(s) to enter land, search it and seize certain items for the purposes of implementing the Act (ss80-85).

Marine and Coastal Act 2018 (Vic)

The *Marine and Coastal Act 2018* (Vic) (for the purposes of this section of the report, this will be sometimes be referred to as 'the Act') partially repeals and replaces the *Costal Management Act 1995*. It is an effort by the state government to provide legislation that focuses more on marine management, reforms and streamlines coordination mechanisms and implements a number of recommendations from the Victorian Auditor-General's Office report (2018), *Protecting Victoria's Coastal Assets*, which criticised the lacklustre protection mechanisms in place at the time. While much of the policy framework that will implement the Act is still being created – such as *Victoria's Marine and Coastal Reforms Transition Plan* (DELWP 2018) – the Act is likely to have several ramifications for local government.

Part 1—Preliminary

The purposes of the Act are as follows:

Section of the Act	Purpose of the Act
s1(a)	to establish an integrated and co-ordinated whole-of-government approach to protect and manage Victoria's marine and coastal environment; and
s1(b)	to provide for integrated and co-ordinated policy, planning, management, decision-making and reporting across catchment, coastal and marine areas; and
s1(c)	to repeal and partially re-enact the Coastal Management Act 1995; and

s1(d)	to establish objectives and guiding principles for ecologically sustainable planning, management and decision-making under this Act; and
s1(e)	to replace the Victorian Coastal Council with the Marine and Coastal Council; and
s1(f)	to abolish the Regional Coastal Boards; and
s1(g)	to provide for the preparation of a Marine and Coastal Policy, a Marine and Coastal Strategy, and a State of the Marine and Coastal Environment Report; and
s1(h)	to provide for the formation of regional and strategic partnerships to address regional and issue-based and integrated marine and coastal planning; and
s1(i)	to provide for other planning mechanisms in the form of environmental management plans and coastal and marine management plans; and
s1(j)	to provide for the giving of consents to use or develop, or undertake works on, marine and coastal Crown land and establish an application process; and
s1(k)	to allow coastal Catchment Management Authorities and the Melbourne Water Corporation to provide advice on matters relating to and affecting coastal erosion; and
s1(l)	to allow the Secretary to prepare and make guidelines to assist with the implementation of this Act; and
s1(m)	to create offences and other enforcement mechanisms relating to the unauthorised use or development of, or works on, marine and coastal Crown land; and
s1(n)	to amend various other Acts to provide for integrated and co-ordinated management of the marine and coastal environment of Victoria; and
s1(o)	to provide for effective community engagement and education in planning and management.

Part 2—Objectives and Guiding Principles

Part 2 of the Act sets out a series of 'objectives' and 'guiding principles' that decision-makers should have regard to when making and implementing decisions and/or policy under this Act. However, unlike other legislation (such as the *Climate Change Act 2017* (Vic)), the Act does not specify who should have regard to them, when they should be included or whether these are compulsory considerations. (It is only the Marine and Coastal Council (see below for an explanation of who this body is and what role they play) which is explicitly required to regard to them under s16(2) of the Act). Given the lack of specificity, it is presumed that these are broad guideposts for decision-makers to follow on the path to achieving the Act's goals.

For ease, the objectives and guiding principles have been extracted and summarised below. The difference between objectives and guiding principles is that the former expresses the goals of the Act in broad terms, while the latter offers a checklist that decision-makers should follow in developing their reasoning for decisions and/or policy.

Guiding Principles of the Act

s8(1)	*Integrated coastal zone management* Planning and management of the marine and coastal environment should be co-ordinated across: • The marine and coastal environment and associated catchments • The water cycle • Industry sectors and users of these areas and their resources • Land tenure, where it affects these areas and their resources
s8(2)	*Integrated coastal zone management*

	Planning and management of the marine and coastal environment should be co-ordinated should take into account short-term and long-term perspectives on environmental, social and economic issues.
s9	*Ecosystem-based management* Planning and management of the marine and coastal environment should aim to restore ecosystems and their resources where possible. It should also aim to avoid destruction where possible and build resilience to the future challenges of climate change.
s10	*Ecologically sustainable development* When developing the marine and coastal areas, regard should be had to the improving the quality of life for both current *and* future generations.
s11	*Evidence-based decision-making* Planning and management of the marine and coastal environment should be based on the best available and relevant environmental, social and economic information.
s12	*Precautionary principle* Ff there are threats of serious or irreversible environmental and other damage, lack of full certainty or scientific understanding should not be used as a reason for postponing measures to prevent environmental or other degradation.
s13	*Proportionate and risk-based principle* Risk management and regulatory approaches should be proportionate to the risk involved.
s14	*Adaptive management* Decision-makers should learn from previous operational programs.

Part 3—Marine and Coastal Council

Another main feature of the Act is that it abolishes the Regional Council Boards, in favour of a centralised and simplified Marine and Coastal Council ('the Council'), established under s15 of the Act. The Council differs slightly in function from its predecessor. Rather than preparing the Marine and Coastal Policy and Marine and Coastal Strategy as per previous arrangements, the Council now has an advisory role. Under s16(1), it is to provide 'guidance' and 'strategic advice' on the drafting and implementation of the documents to DELWP, who is now responsible for their administration. Other areas in which the Council is expected to provide advice to DELWP include: 'significant' decisions, decisions involving scientific research, the preparation of environmental management plans and/or the preparation of regional and strategic partnerships.

The next sections of the Act give specifications about how the Council shall operate. These are not relevant to local councils, so they are given only brief summaries here. The provisions specify: who must comprise the membership of the Council (s17); the terms and conditions of their appointment (s18); how and when they can be removed from their roles (s19); what pecuniary and other conflicts of interest they must disclose and when (s20); the procedure of

their meetings (s21); their reporting obligations to DEWLP (s22); and the Council's ability to appoint committees and establish their procedures (s23).

Part 4—State-wide Marine and Coastal Policy, Strategy and Report

Part 4, Division 1 requires that the Minister make a *Marine and Coastal Policy* ('the Policy') (s24(1)) which – true to its name – outlines the Minster's policies for the marine and coastal environment and provides guidance to decision-makers in achieving the objectives in Part 2. The wording of the language indicates that these objectives are a consideration and not a compulsory requirement. However, note that the wording only mentions that the decision-maker must consider the 'objectives' and does not explicitly mention the 'guiding principles' (s24(2)).

The Policy must also contain a 'marine spatial planning framework that establishes a process for achieving integrated and co-ordinated planning and management of the marine environment.''(s24(3)). It is unclear what exactly this entails, as this policy is still being developed.

There are several requirements that the Minister must follow in order to prepare the Policy. However, these are largely irrelevant to local councils. The exception is the public consultation requirements. By requiring that the Policy must be published online, in newspapers (s26(1)(a); (b)) and be open to submissions (s26(1)(a)(ii)) gives local councils and their constituents an opportunity to become involved in the development of the Policy. However, note that although the Minister must consider the submissions (s26(2)), they do not have to include the submission's recommendations in the final Policy (s28(1)).

Local councils may also have an opportunity to lobby the relevant Ministers about whether or not to endorse the Policy, as it cannot be approved without the consent of all Ministers who might be affected by the policy (s27). The question of which other Ministers might be affected by the policy and so be 'relevant' is decided by the Minister (likely of DEWLP), not by an objective standard of fact (s27(b)).

The final opportunity local councils might have to lobby for influence in the development is the Policy is through its amendment after publication. Amendment can be done at any time with the consent of the 'relevant' Ministers (again, 'relevance' being determined by the Minister themselves) under s29(1). However, the same procedural and publication restrictions apply to an amendment, as if it were the draft of the original Policy (s29(2)). The exception to this is if the amendment is 'fundamentally declaratory, machinery or administrative in nature' (s29(3)). Again, however, whether something is are 'fundamentally declaratory, machinery or administrative in nature' is determined by the Minister.

Division 2, Part 4 outlines the process for creating a *Marine and Coastal Strategy* ('the Strategy'). The Strategy differs from the Policy (see Division 1) in that it sets out the *actions* required to implement the goals outlined the Policy.

Again, it is a compulsory requirement for the Minister to make a Strategy (s30(1)), within 12 months of the creation of the Policy (s31(1)) and again every 5 years (s31(2)). However, there are several additional requirements that go above and beyond those required for the Policy. The Strategy comes with the addition of timelines specifying when the actions must be completed by (s30(3)(a)) and by who (s30(3)(b)). The Secretary is also responsible for coordinating the

implementation of the Strategy (s30(4)) – at this stage, not much is known what this arrangement will practically look like. In preparing the Strategy the Minister must consult, among others, 'any of the following persons or bodies whose interests… may be affected by the strategy' (s32). Local councils are listed as an explicit example of a body whose interests might be so affected (s32(3)(ii)). However, again, this is at the discretion or 'opinion of' the Minister (s32(3)(a)).

Local councils might be involved in: assisting their constituents in preparing submissions through the public consultation process that is required when preparing the Strategy (s33), lobbying for or against the endorsement of the Strategy (s34) and lobbying for or against amendments (s36) after the Strategy's initial publication (s35) – these processes are the same as the Policy (see s4 above for an explanation).

The final document required of the Minister under this Part is the *State of the Marine and Coastal Environment Report* (s37(1)), which must include information on: the condition of the marine and coastal environment; the environmental, social and economic benefits of the marine and coastal environment; and the threats to the marine and coastal environment (s37(2)). Its purpose is largely to inform the Minister's production of the Policy and the Strategy, as the report must be considered when developing them (s25, s32).

Similar to the previous two documents, while the procedural requirements on how to produce the report are largely irrelevant to local councils, the information contained within them could be quite useful to local councils in guiding their future decision and/or policy-making endeavours. This is particularly so since the report must be published before each House of Parliament, on the DELWP's website and in the Government Gazette (s39).

Part 6—Regional Marine and Coastal Planning

Part 6 outlines the process for creating and implementing two further oversight mechanisms that comprise the working marine and coastal planning framework of 'integrated and co-ordinated policy, planning, management, decision-making and reporting across catchment, coastal and marine areas' (s1(b)).

The first of these mechanisms is the regional and strategic partnerships ('partnerships') which aim to 'address regional and issue-based and integrated marine and coastal planning' (s1(h)). This is the section of the Act that is perhaps most relevant to local councils because, although not specified in the text, they will be considered key players in the 'regional' framework.

In s46(3)(ii) of the Act, municipal councils are listed as a party which should be consulted when developing a partnership only 'if the municipal council is not one of the parties' already – indicating the legislation contemplates this as a likelihood. This also means that even if local councils are not direct parties to the partnership, there is still scope for their involvement in the consultation process (see below).

The framework is established by the Minister (again, presumably this is the Minister of DELWP, given that it will likely be the lead agency) between two or more partner agencies (s42(1)) for the purposes of responding to 'identified regional issues relating to or affecting the marine and coastal environment' or preparing products that aim to do the same (s42(2)).

A ‘partner agency’ can be any ‘government or non-government body that has an interest in or connection with the marine and coastal environment’ (s3). The Council can make a request to the Minister to suggest favourable partnerships (s42(4)) and every party to the partnership must consent before it will become effective (s42(3)).

The partnership must be consistent with: any Policy, Strategy and regional catchment strategies that may apply to the area; any relevant legislation; and the objectives and guiding principles outlined in Part 2 of the Act (see s2) (s46(1)).

(Note that under s23 of the *Catchment and Land Protection Act 1994* (Vic), a regional catchment strategy is ‘a document… that sets out how the catchments in a region are to be managed’ and is usually produced by the Secretary, who is a member of the Victorian Catchment Management Council). A copy of the instrument establishing the partnership must be published by the Minister in the Government Gazette (s44).

If preparing a ‘product’ under the strategy, the parties to the partnership are compulsorily required to consult with the Council and any ‘persons or bodies who[se] interests, in the opinion of the parties, may be affected’, such as relevant Ministers, a specified Aboriginal party or a public authority (s46(3)(b)) (a public authority being ‘any body corporate or unincorporated established by or under an Act for a public purpose, but does not include a municipal council or a committee of management of reserved Crown land’ under s3 of the Act). The words ‘in the opinion of the parties’ shows that this decision of who is or is not affected is at the discretion of the parties to the partnership.

The second of these mechanisms are environmental management plans (EMP). Section 49 requires the Minister to make one for the Port Phillip Bay area but EMPs can also be made in respect of any other area of the marine environment – that is, the land, water and associated biodiversity between the ‘outer limit of Victorian coastal waters and the high-water mark of the sea’ (s3) – in accordance with s49.

Although local councils are not clearly envisioned as potential parties of EMPs, it is possible that they will be affected by their application. There is also an opportunity for local councils to become involved in the consultation process.

Under s50(1), an EMP must include:

- proposed actions to be undertaken to improve water quality, protect beneficial uses and to address threats relating to and affecting the area in respect of which the plan is prepared; and
- a description of how the plan promotes the objectives of any State environment protection policy applying to that area; and
- an implementation plan, including proposed timeframes for the implementation of actions and the agencies responsible for delivering those actions; and
- a framework to monitor, evaluate and report on the implementation of the plan.

These requirements are very similar to the procedural requirements surrounding the creation of partnerships (discussed in Division 1 of the Act). An EMP must be consistent with: any Policy, Strategy or regional catchment strategy that already applies to the area; any relevant legislation; and the objectives and guiding principles outlined in Part 2 of the Act (s51(1)).

When preparing an EMP, it is a compulsory requirement that the Minister consults with the Council and any 'persons or bodies who interests, in the opinion of the parties, may be affected', such as relevant Ministers, a specified Aboriginal party or a public authority (s51(3)(b)). The words 'in the opinion of the parties' shows that this decision of who is or is not affected is at the discretion of the Minister.

Part 7—Local Marine and Coastal Management

The *Local Marine and Coastal Management Plan* (CMMP) established in Part 7 of the Act will likely be relevant to local councils as the plans can apply to any marine and coastal Crown land (this includes the 'biodiversity' – plant or animal life – associated with or on that land under s56).
As Crown land managers, local councils can make these plans for the purpose of 'providing direction for the future local management of the area' (s57(2)). A local council will be required to make such a plan upon receiving a request from the Minister to make a plan for a specific area (s57(3)). A plan must be made within 3 years of such a request (s57(4)).

Under s58, a CCMP must include:

- an implementation plan, including proposed timeframes for the implementation of actions and the agencies responsible for delivering those actions; and
- a framework to monitor, evaluate and report on the implementation of the plan; and
- a description of the proposed use, development and works for the area to which the plan applies.

A CCMP must be consistent with: any Policy, Strategy and regional catchment strategies that may apply to the area; any relevant legislation; and the objectives and guiding principles outlined in Part 2 of the Act (see s2) (s59).

When preparing a CCMP, the Crown land manager is compulsorily required to consult with the Council and any 'persons or bodies who interests, in the opinion of the parties, may be affected', such as relevant Ministers, a specified Aboriginal party or a licence holder or lessee for the land in question (s59(3)(b)). The words 'in the opinion of the parties' shows that this decision of who is or is not 'affected' is at the discretion of the parties to the partnership.

There is also a requirement that there be public consultation. The Crown land manager must publish the CCMP on both the DELWP's website and in a newspaper that circulates throughout Victoria with a summary of the CCMP (s60(1)). The land manager must also open that draft to submissions (for a minimum period of 28 days) (s60(1)(c)) and then consider all submissions made before the specified deadline (s60(2)).

After this consultation and public consultation process has occurred, the parties must also receive Ministerial approval before a CCMP can be implemented (s61(1)). This can either be done outright or with suggestions for amendment from the Minister (s61(2)) and the Minister is also required to publish notice of this approval in the Government Gazette and on the (s61(3)) and on the DELWP's website (s61(5)). Ministerial consent is also required for any 'use, development or works that may be undertaken in the area to which the plan applies' (s62).

A CCMP can be amended at any time by the Minister (s63(1)), provided that the Minister follows the same procedures outlined above, as if drafting the CCMP anew (s63(2)). The

exception to this is an amendment that is 'fundamentally declaratory, machinery or administrative in nature', as determined by the Minister themselves (s63(3)).

There is no express provision outlining how a CCMP can be ended. Instead, there is a requirement that the Minister review the CCMPs no later than 5 years after it comes into effect (s64(1)) and that the CCMP is then amended accordingly (s64(2)).

Division 2, Part 7 specifies that a person must obtain consent ('a consent') in order to use or develop marine and coastal Crown land (unless that use or development falls within a prescribed exemption under s65(2))).

This section is relevant to local councils because they may have to make applications to use or develop marine and coastal Crown land in order to fulfil their function as a local council or alternatively, may have to grant such applications in their capacity as land manager.

A failure to obtain consent can result in either 60 penalty units for a natural person or 300 penalty units for a body corporate (s65(1)). For the period between 1 July 2018 to 30 June 2019, one penalty unit is worth $161.19(https://www.legalaid.vic.gov.au/find-legal-answers/fines-and-infringements/penalty-units). Thus, 60 penalty units amounts to a $9,671.40 fine while 300 penalty units amounts to a $48,357 fine.

A failure to obey the conditions attached to a consent has a penalty of up to 60 penalty units ($9,671.40) if they are a natural person or 300 penalty units ($48,357) if they are a body corporate (s66). A failure to obey the reporting obligations attached to a consent has a penalty of up to 12 penalty units ($1,934.29) for a natural person or 60 penalty units ($9,671.40) for a body corporate.

The Minister can approve a consent in response to an application made either in the form prescribed by the Minister or made in the form of a referral from the Minister, Secretary or Department (s68).

When considering whether to approve an application, under s69, the Minister must ensure that the consent is consistent with:

- Any Policy or Strategy that applies.
- The objectives and guiding principles set out in Part 2 (see above).
- Any product made under a regional and strategic partnership, EMP or CCMP (see above).
- Any relevant costal recommendation (from either the Victorian Environmental Assessment Council or the Land Conservation Council).

Under s70(1), the Minister can respond to an application of consent in several ways. The Minister can give partial or complete consent, give a partial or complete refusal or attach conditions.

The Minister can also ask for additional information from the applicant (s70(4)) at any time within the 60 business days the Minister has to decide and respond to the applicant (s70(3)). Such a request for more information must be in writing, must specify what information is required and the date it is required by (a maximum of 30 days after the request for information is made) (s70(5)). Where this information is requested and then provided, the Minister must decide and respond to the application within 30 business days (s70(6)).

Where either the Minister does not decide and respond within this period or the applicant does not respond with the requested information, the application for consent is automatically refused (s70(7)).

A consent can be subject to a prescribed condition of either 'general application' or a condition that applies only to a specific class of consent (s74(2)). In the event of any inconsistency between a condition imposed on a consent under the initial application process and a prescribed condition, the condition imposed under the initial application process prevails.

As a condition of the consent, the Minister has the power to require a bond be provided as security for the use or development under application (s71(1)), which may be forfeited if there is a failure to adhere to the consent or its conditions (s71(3)). The exact conditions of this forfeiture – whose funds are to be used only for the purpose of 'rehabilitating, rectifying or reinstating the land' (s71(4)) – are to be specified in the individual application (s71(3)). Otherwise, the money is to be returned to the applicant on the date specified in the application for consent itself (s71(5)). The sum of money fixed by the Minister must deposited to the Secretary at the determine by the Secretary (s71(2).

As a condition of the consent, the Minister has the power to require a management charge be paid in periodic instalments (s72(1)). The applicant must pay the Secretary the sum of money – which is to be determined by the *Monetary Units Act 2004* (Vic) – within a period of time determined by the Secretary (72(2)). If the money is not spent for the purposes of managing the land to which the consent is given (s72(3)), it must be returned to the payee on the date specified in the consent (s72(4)). If the Crown land manager is the one administering the management charge (note, they can administer this charge but not the bond above), they must provide a summary of how that charge was used in order to prove to the secretary that it was only used for the appropriate purpose (s72(6)).

This charge can be increased or decreased by the Minister, upon the request of the Crown land manager (s73(1)). Before increasing the charge, the Minister must provide notice to the payee and allow them to make oral or written submissions to oppose it if they desire (s73(2)). The increase will take effect on the date specified in the Minister's notice (s73(5)).

The Minister (presumably, the Minister of DELWP) may require a Coastal Management Authority or the Melbourne Water Corporation to provide technical advice on any matters relating to or affecting coastal erosion in its waterway management district. The Minister must ask for advice via a notice published in the Government Gazette (s75(1)) which specifies who the advice must come from (s75(2)) and to whom it must be provided (s75(3)). This function is largely irrelevant to local councils, as there is no requirement of publication and thus, the local councils will be unlikely to access the information.

Part 8—General Obligations on Crown Land Managers

If local councils are responsible for the management of any Crown land, when managing that land the local councils must take all reasonable steps to implement the following in relation to that land: the Policy, the Strategy, a product made under a regional and strategic partnership, an environmental management plan and/or a coastal and marine management plan (s76(1)). The fact that a local council could become subject to these agreements further reinforces the

argument that local councils should be considered in consultation processes for the Policy and Strategy.

However, where there is legislation that regulates that land in some way that conflicts with the instructions in those documents, the legislation takes priority (s76(2)).

Part 9—Authorised Officers

Part 9 will likely only be relevant to local councils for two reasons. Firstly, because the local council is subject to one of the authorised officer's powers. Under s77, an authorised officer can request the name and address of a person where there is a reasonable belief that the person has contravened or is contravening a consent given to that person. Under s78, an authorised officer can direct a person while they are on marine and coastal Crown land to stop an activity where the officer reasonably believes that the activity contravenes a consent or remove any matter or thing from the land which contravenes a consent. Under s79, the authorised officer must produce identification when exercising either of the powers in s77 or s78, but only where reasonable to do so.

Secondly, a member of the local councils themselves could be appointed as an 'authorised officer', as per the procedures outlined in s83 of the *Conservation, Forests and Land Act 1987* (Vic), giving them the ability to exercise these powers. However, this is unlikely because the intention of the provision seems to be largely to empower bodies such as Parks Victoria, who are explicitly listed as an example of a suitable beneficiary for these powers under the Act.

Environment Protection Act 1970 (Vic)

Under Part III of the *Environment Protection Act 1970* (Vic) (for the purposes of this section of the report, this will be sometimes be referred to as 'the Act'), the Governor in Council has the power to declare that the environment protection policies and waste management policies created with the authority of this Act must be observed (ss16, 16A). Municipal councils will likely be obliged to follow the directives of these policies. Sections 17-18D, 19 outline the procedures for creating these policies. Under s19AA, the Act also allows for the creation of 'economic measures' used 'for the purpose of providing an economic incentive to avoid or minimise harm to the environment or any portion or segment of the environment by a particular activity.'

Examples given include tradeable permit schemes and environmental offsets. Sections 19AB-AC outline how such measures might operate.

Under s19AE, a 'protection agency' (in s3, a 'protection agency' is 'any person or body… having powers or duties under any other Act with respect to the environment…', meaning a municipal council will likely be regarded as a protection agency under this definition) can submit a proposal to develop a neighbourhood environment improvement plan. This can also be compulsorily required under s19AG.

Under s19AF, protection agencies also have the powers to request the Authority conduct audits and investigations about the state of the environment. However, this is usually done in order to trigger a notice requiring a neighbourhood environment improvement plan. If recognised as a protection agency, it is unlikely that a council would use this power given that it would be

easier to undertake a plan voluntarily. Sections 19AH-19AJ outline the process of preparing a plan.

Section 19A prevents the occupier of a 'scheduled premises' (of which municipal councils are likely to be) from doing anything that may increase the amount of waste the facility produces, especially waste which is a 'danger or potential danger to the quality of the environment', or from producing waste which necessitates a change in waste handling facilities. The section also explicitly lists several ways in which this might occur. Sections 20-20A outlines the application process for a licence which allows the occupier to undertake these activities in limited circumstances. An occupier is also prohibited from using the premises to store (or to store in excessive amounts) 'notifiable chemicals', as determined by the authority (s30C(1)).

Section 19B-19CA outlines the application process for 'works approvals' that municipal councils may need to apply for. Section 19D-19G outlines the application process for 'research, development and demonstration approval' that municipal councils may need to apply for. When issuing any of these approvals or licences the authority can attached special conditions to them that must be complied with (s21). Sections 22-26E, 30, 31, 31D outline the procedures the authority must follow in deciding whether to grant such applications, and other conditions (such as fees) that may apply. Sections 27-27A outline offences relating to waste that exist under the Act. Section 28 authorises the authority to give notice in writing to a municipal council that has contravened the conditions of a licence to:

> to make no further connexions to or arrange no new collections for its waste collection and treatment system; or
>
> to refrain from issuing further building permits which would result in additions to the waste discharge or the waste treatment loading until its waste discharge is brought into compliance with the conditions of its licence.

Sections 28A-30, 30A, 30D, 31A-31C outline several additional powers that the authority has under the Act. Part VII outlines the obligations local councils will face should they desire to discharge or despite waste onto land, as well as the accompanying offences should they fail to follow these.

Flora and Fauna Guarantee Act 1988 (Vic)

This Act has been superseded and the relevant Act is now the *Flora and Fauna Guarantee Amendment Act 2019* (Vic). The *Amendment Act* came into force on 1 June 2020, and a detailed analysis of it is beyond the scope of this report. However, two notable changes include: specific reference to 'the potential impacts of climate change' (s4A(b)) as one of the guiding principles of the *Amendment Act*, and changes in s46 to state government responsibilities on the consideration of climate change with respect to the preparation of Biodiversity Strategies and habitat conservation orders made by the Minister. The below details the analysis undertaken in early 2019.

As outlined in s1 of the 1988 Act, the purpose of the *Flora and Fauna Guarantee Act 1988* (Vic) (for the purposes of this section of the report, this will be sometimes be referred to as 'the Act') is to 'establish a legal and administrative structure to enable and promote the conservation of Victoria's native flora and fauna…'. Part 1 of the Act outlines the purpose, commencement, definitions and objectives of the Act (ss1-4). It also outlines the process for excluding certain flora and fauna from the coverage of the Act (s5). Part 2 outlines the powers and responsibilities of the Secretary (s7), the Scientific Advisory Committee (established under

s8 of the Act) and several other organisations which are expected to provide advice to the Minister (s9).

Section 10 gives the Governor in Council the ability to add a 'taxon' ('a taxonomic group of any rank into which organisms are categorised', as defined by s3 of the Act) or a community of flora or fauna to 'the list.'

'The list' recognises when flora or fauna 'is in a demonstrable state of decline which is likely to result in extinction or if it is significantly prone to future threats which are likely to result in extinction' (s11). Inclusion triggers a series of powers, duties and responsibilities by various actors which seek to preserve that flora or fauna.

One such preservation or management mechanism is the *Flora and Fauna Guarantee Strategy* (s17) which, among other things, requires the Secretary to improve 'the ability of all relevant people to meet the flora and fauna conservation and management objectives' (s17(2)(d)) – municipal councils likely being one such relevant person/body. Sections 18-20 outline the procedures for preparing this Strategy.

Another management tool is 'management plans.' The Secretary is obliged to involve the relevant landholder in this process (s21(3)), giving municipal councils an opportunity to be involved either as the landholders concerned or as advocates on behalf of their constituents who are subject to the plans. Sections 22-25 outline the procedures for preparing these plans.

Municipal councils may also be subject to an interim conservation order in order to conserve a 'critical habitat' of the listed flora of fauna that resides on Crown land or water (s26). An order of this ilk can regulate the conservation of the area, activities or processes (regardless of whether they take place on the land or off it) and might so adversely affect that conservation (s27). Sections 28-43 outline the procedures for preparing such an order, including the opportunity to challenge such an order in the VCAT. Section 44 also states that the Minister and Secretary may take reasonable steps to ensure the conservation of the flora, fauna or their habitat in question before the interim conservation order expires.

Sections 47-53 outline several offences relating to flora (such as trading it without licence) and the relevant licence or exemption schemes which surround it.

Sections 54-56 outline the application process for licences or permits that give the recipient exemption to some of the prohibitions in the Act. Sections 57-59 outline the power of authorised officers. The remaining sections are likely not relevant to municipal councils unless they have an adverse finding against them under one of the provisions of the Act.

Public Health and Wellbeing Act 2008 (Vic)

The primary decision-making powers under the *Public Health and Wellbeing Act 2008* (Vic) (for the purposes of this section of the report, this will be sometimes be referred to as 'the Act') fall to the Secretary, with significant oversight by the state government. The Secretary is the Department Head (per the *Public Administration Act 2004* (Vic)) (s16), whose powers derive from s17 and whose role is to initiate, support and manage public health processes at the state level. A Chief Health Minister is appointed by the Secretary (s20) and is largely responsible for administering the Act.

The functions of Councils under this Act are complex, and it is [at 1 March 2019] unclear how these duties relate to climate change risk. To illustrate this complexity, the relevant legislative provisions are extracted as follows.

Section 24 Function of Councils
The function of a Council under this Act is to seek to protect, improve and promote public health and wellbeing within the municipal district by—

(a) creating an environment which supports the health of members of the local community and strengthens the capacity of the community and individuals to achieve better health;
(b) initiating, supporting and managing public health planning processes at the local government level;
(c) developing and implementing public health policies and programs within the municipal district;
(d) developing and enforcing up-to-date public health standards and intervening if the health of people within the municipal district is affected;
(e) facilitating and supporting local agencies whose work has an impact on public health and wellbeing to improve public health and wellbeing in the local community;
(f) co-ordinating and providing immunisation services to children living or being educated within the municipal district; (g) ensuring that the municipal district is maintained in a clean and sanitary condition.

Section 26 Municipal public health and wellbeing plans

(1) Unless section 27 applies, a Council must, in consultation with the Secretary, prepare a municipal public health and wellbeing plan within the period of 12 months after each general election of the Council.
(2) A municipal public health and wellbeing plan must—

(a) include an examination of data about health status and health determinants in the municipal district;
(b) identify goals and strategies based on available evidence for creating a local community in which people can achieve maximum health and wellbeing;
(c) provide for the involvement of people in the local community in the development, implementation and evaluation of the public health and wellbeing plan;
(d) specify how the Council will work in partnership with the Department and other agencies undertaking public health initiatives, projects and programs to accomplish the goals and strategies identified in the public health and wellbeing plan;
(e) be consistent with—
(i) the Council Plan prepared under section 125 of the Local Government Act 1989; and
(ii) the municipal strategic statement prepared under section 12A of the Planning and Environment Act 1987.

(3) In preparing a municipal public health and wellbeing plan, a Council must have regard to the State Public Health and Wellbeing Plan prepared under section 49.
(4) A Council must review its municipal public health and wellbeing plan annually and, if appropriate, amend the municipal public health and wellbeing plan.
(5) Despite subsection (2)(c), a Council is not required to provide for the involvement of people in the local community when reviewing or amending a municipal public health and wellbeing plan under subsection (4).

(6) A Council must give a copy of the current municipal public health and wellbeing plan to the Secretary.
(7) A copy of the current municipal public health and wellbeing plan must be available for inspection by members of the public at the places at which the current Council Plan must be available under section 125(11) of the Local Government Act 1989.

Section 27 Inclusion of public health and wellbeing matters in Council Plan or Strategic Plan

(1) A Council is not required to comply with section 26 if—

(a) the Council complies with this section; and (b) the Secretary grants the Council an exemption from complying with section 26.

(2) If a Council intends to comply with this section, the Council must— (

a) address the matters specified in section 26(2) in the Council Plan to be prepared under section 125 of the Local Government Act 1989 or in a Strategic Plan prepared and approved by the Council;

(b) if the matters specified in section 26(2) are included in the Council Plan, review the Council Plan in accordance with section 125(7) of the Local Government Act 1989;

(c) if the matters specified in section 26(2) are included in a Strategic Plan, review the Strategic Plan annually.

(3) A Council may apply to the Secretary for an exemption from complying with section 26 by submitting a draft of the Council Plan or Strategic Plan which addresses the matters specified in section 26(2).
(4) If the Secretary is satisfied that the draft Council Plan or Strategic Plan adequately addresses the matters specified in section 26(2), the Secretary must grant the Council an exemption from complying with section 26.
(5) If the Secretary is not satisfied that the draft Council Plan or Strategic Plan adequately addresses the matters specified in section 26(2), the Secretary must—

(a) refuse to grant an exemption from complying with section 26(2); and (b) advise the Council in writing—

(i) of the reasons for refusing to do so; and

(ii) as to the changes that should be made to the draft Council Plan or Strategic Plan.

(6) If a Council has been granted an exemption from complying with section 26, the Council must give a copy of the current Council Plan or Strategic Plan to the Secretary if a change is made to the Council Plan or Strategic Plan which relates to the matters specified in section 26(2).

Section 28 Special powers of Secretary in a state of emergency

If there is a state of emergency, the Secretary may do all or any of the following—

(a) order a Council to perform any functions or duties, or exercise any powers, that the Secretary directs;

(b) perform all or any of the functions or duties, or exercise all or any of the powers, of a Council;

(c) order any officer of a Council to perform a particular function or duty or to exercise a particular power;

(d) order any authorised officer of a Council to perform any functions or duties, or exercise any powers, in another municipal district that the Secretary directs.

There is significant overlap of roles and responsibilities as between local and state government under this Act. It is important to recall that this Act was created with other uses in mind (for example, the regulation of sex work). The linkages to climate change risk are likely to be more related to the transmission of diseases due to changing climatic conditions (for example, more mosquitoes spreading dengue virus due to hotter weather), rather than the regulation of human activity. The occurrence of COVID-19 and the use of state of emergency powers illustrates the importance of understanding the overlap of roles and responsibilities as between state and local governments under this Act.

A review of this Act for 'climate change' considerations or variations thereof results in nil elaboration on the above.

Therefore, the relationship between the state and local government, this Act, the *Climate Change Act 2017* (Vic) and climate change risk generally, warrants further investigation.

Water Act 1989 (Vic)

The *Water Act 1989* (Vic) (for the purposes of this section of the report, this will be sometimes be referred to as 'the Act' or the 'Water Act') is a comprehensive legislative framework that regulates activities between public institutions, third party entities, the state government, local government, and others who meet the definition of 'an individual'. The Act regulates each party's rights to access water, how they use water, and how they manage water (i.e. drainage and storm water management). Due to the comprehensiveness of the Water Act, this review undertakes a broad overview of the range of roles and responsibilities apportioned to relevant decision-makers under the Act.

Part 1—Preliminary

Part 1 outlines the purposes of the Act, the date of its commencement (1 September 1991) and its definitions. Where these provisions are relevant to municipal councils, they will be discussed in the sections below. Part 2, Division 1 outlines the rights of the Crown, individuals and water corporations.

1. The Crown has 'the right to the use, flow and control of all water in a waterway and all groundwater' (s7(1)).
2. Individuals have the 'right to take water, free of charge, for that person's domestic and stock use from a waterway or bore to which that person has access', whether that bore or waterway be by a public road, an adjacent waterway that remains the property of the Crown or on their own private property (s8(1)). If the bore in question is a State observation bore, the person must obtain written permission from the Minister first (s33C). Under s3, the definition of 'person' can include a local council.
3. Authorities have the right to take the amounts of water that are made available to it under a bulk entitlement or under other entitlements, licences or rights under the Act (s9(1)). Under s34(1), the definition of 'authorities' includes Water Corporations or Catchment Management Authorities (but not local councils).
4. Individuals or Authorities have the right to 'construct or operate works'* for the drainage of any land; the collection, storage, taking, use or distribution of any water; or the obstruction or deflection of the flow of any water. This must be done in accordance with the conditions of the Act (s12).

* Note that as well as the examples listed here a ‘work’ can also includes fencing and ‘reservoirs, dams, bores, channels, sewers, drains, pipes, conduits, fire plugs, machinery, equipment and apparatus, whether on, above or under land’ (s3).

The Minister has the ability to temporarily (s33AAA) or permanently (s33AAB) qualify these rights or attach conditions to the exercise of these rights (s33AAD), provided that they follow the procedures outlined in s33AAD. If applied, local councils must comply with these qualifications or conditions.

Although local councils are not explicitly listed as the recipient of these rights, it is useful for them to have an understanding of the Act, in order to be clear on their obligations within it.

Part 2—Rights and Liabilities

Part 2, Division 2 outlines civil liability under the Act. For local councils, this shows both how they could incur liability or how they can take action against another who is liable. Under s15(1), a person can accrue civil liability in four ways:

1. By taking water in an unauthorised manner or in unauthorised quantities;
2. By using water in an unauthorised manner or for an unauthorised purpose;
3. By polluting water;
4. By constructing, maintaining or operating any unauthorised works.

Under s16, a person can accrue civil liability in three ways. Note that for Councils, this liability can be incurred by one of their employees acting on behalf of the Council (s16(3)).

The first way to accrue liability requires three things to happen in order to accrue civil liability (s16(1)):

1. If there is a flow of water from their land onto the land of another.
2. If that flow is not ‘reasonable’. What is ‘reasonable’ will be determined by weighing the following factors outlined s20:
    a. Whether the flow or works that caused the flow were authorised;
    b. Whether the flow or works complied with the conditions of the Act;
    c. Whether the flow or works complied with the guidelines or principles (if any) published by the Minister;
    d. Whether or not the impact of the flow or works onto the other person’s land was taken into account;
    e. The uses to which the lands concerned and any other lands in the vicinity are put;
    f. The contours of the lands concerned;
    g. Whether the flowing water was bought onto the land, collected, stored or concentrated on the land, or extracted from the land. What purpose and with what degree of care the brining, collection or extraction was done;
    h. Whether or not the flow was subject to any restrictions along the waterway;
    i. Whether or not the flow is likely to damage any waterway, wetland or aquifer.
    j. (Note that factors ‘a’-‘d’ are deemed to be more important in making this decision than the remaining factors under s20(2)).
3. The flow causes injury to another person, damage to their property or economic loss.

The second way to accrue liability requires three things to happen in order to accrue civil liability (s16(2)):

1. If the person interferes with a reasonable flow of water onto any land. This includes interference by negligent conduct.
2. The flow interfered with was reasonable. The same factors in determining a 'reasonable' flow apply under this section as in s15.
3. The interference causes injury to another person, damage to their property or economic loss.

The third way to accrue liability requires two things to happen in order to accrue civil liability (s16(5)):

1. The previous occupier of the land did or omitted to do one of the acts outlined in s16(1) and s16(2) above.
2. The current occupier (for local councils, where they have acquired possession of land) does not take reasonable steps to prevent the consequences of the previous occupier's actions. The concept of 'reasonable steps' will likely be determined in court or Tribunal (likely VCAT) using the precedent surrounding 'reasonable person.'

Under both ss15-16, the penalty of breaching or failing to meet these requirements is that the person who accrues civil liability is liable to pay damages to the afflicted person. The amount of damages is determined by VCAT and is meant to compensate for the injury, damage or loss caused by the liable person's actions.

The VCAT has several other remedies it can offer. These include injunctions, damages or declaratory orders (s19(3)); orders for compensation; orders that the works to be continued, removed or modified; or orders that a party pay for the removal or modification of works (s19(5)).

Part 3—Assessment of and Accounting for Water

Part 3 sets out assessments of and accounting processes for water. Council may be required to comply with a direction from a Minister setting limits on water. These will be published in the Government Gazette (s22A). Under s22B, the Minister can (but is not required to) prepare a *Sustainable Water Strategy* ('Strategies') for specific regions. These Strategies will include information such as the identification of threats to the reliability and supply of water and methods of improve on this (s22C). There is no explicit mention that local councils must comply with these priorities (unless further policies develop) but local councils may *choose* to follow their guidance.

Section 22D-I outlines the procedural processes for creating, reviewing and reporting on the *Sustainable Water Strategy*. Under s22E, the Minister is required to give the public (including local councils and local council constituents) the opportunity to inspect the draft Strategy (s22E(d)), as published in a newspaper that circulates the entire state (s22E(e)). The Minister must also consider any comments offered (s22E(f)). This is the only part of this process that local councils might be involved in.

If the Minister issues a review specifying that actions must be taken for an area over which a local council presides, the local council may have several obligations to the Minister. As well as having a number of investigate powers (s23(1)), the Minister can:

- Purchase or compulsorily acquire land that is required for the establishment of works or State observation bores (s23(2)(a)).

- Authorise a person to enter any land and drill for groundwater (s23(2)(b)). Note that consent of the local council must be obtained before this happens (s24(1)).
- Require local councils to collect information relating to the review (s23(2)(c)).
- Require local councils not to destroy, damage, remove, alter or interfere with any works (s23(5)).

Under s27(1), a Minister also has the option to declare an area to be a 'water supply protection area'. Such a declaration will trigger a series of obligations for involved parties that aim to protect the groundwater and/or surface-water resources in that area (s27(2)).

The local council can either apply for such a declaration to be made, have one of its constituents apply (27(3)) or simply be issued a declaration by the Minister or other Authority. If anyone who is not the local council applies for a declaration for land, either partially or completely under local council control, the Minister has a compulsory obligation to inform the local council of the application (s27(5)(f)).

The Minister also has a compulsory obligation to follow a number of procedures in preparing the declaration. They must open the declaration up to public consultation – firstly, by publishing the draft declaration in a newspaper that circulates the area in question (s27(4)(a)(i)) or, as mentioned above, by notifying the Council (s27(4)(a)(ii)) and secondly, by considering any submissions made on this draft (s27(4)(b)). Note that whoever applies for the declaration must pay for these publication requirements (s27(6)).

Local councils can be involved in this consultation process either as a submission from the public or alternatively, as a member of the consultative committee that is also required to comment on the declaration under s29(1)). The local council would be included as a member under the provision that requires 'at least one half of the membership must consist of persons who are owners or occupiers of land in the area concerned' (s29(2(b)).
The Minister may require further information from the applicant (s27(7)) before making the decision. However, the decision about whether to make a declaration must be done within 60 days after the public consultation period has closed (s27(8)). Whatever the result, the decision must be published in a newspaper circulating generally in the area (s27(9)-(10)) and the Minister must cause a declaration to be laid under the Houses of Parliament (s27(11)). The Minister can amend or abolish such a declaration at any time by publishing an order in the Government Gazette (s28).

Once a declaration has been made, the Minister has the option to prepare (or amend) guidelines that should be taken into account when making draft management plans for the area in question (s30(1)).

A draft management plan aims to outline how the resources in the water supply protection can be managed in an 'equitable' and 'sustainable' manner (s32A(1)), while the guidelines give details on what should be included in those plans or in the making of them. The plans can outline obligations such as monitoring the area's resources (s32A(3)(a)) or restricting the taking of the resources (s32A(3)(f)). Local councils are required to comply with these restrictions under s32A(11), lest they risk a penalty of 20 penalty units ($3,223.8 until 31 June 2019) for contravening one (s32A(13)), or for contravening the directions given by the Authority that implements it (s32B(4)). Importantly, a plan can also include a recommendation to the Minister about the total volume of water that should be allowed to be used under the 'permissible consumptive volume' provision.

Local councils can again be involved in the preparation of these draft management plans (in accordance with any guidelines) if they are appointed to the consultative committee (s31(1)). However, note that a local council will never be required to administer or implement the plan as that is the prerogative of 'Authorities' only (s32A(5)). Consultative committees are also required to advise on any amendments to management plans (s32G(2)(c)).

While loca councils will never be required to implement said plans, a local council or one of its constituents does have the ability to apply to VCAT for a review of a decision made by the Authority in the course of them implementing a relevant management plan (s32B(2)). Such an application for review must be made within 28 days of the decision or on the day on which a statement of reasons is given to the person explaining the decision (s32B(3)).

Likewise, if, as part of these management plans, a local council is required to carry out works, install equipment or remove works, then they are entitled to be compensated for any losses or expenses suffered in the process (s32F(1)).

If, as part of these management plans, a benefit is conferred on one person and a detriment is suffered by another person, the second-mentioned person is entitled to be paid by the first-mentioned person compensation for the detriment suffered (s32F(2)). Under this section, a local council could be in either position and thus could be either required to compensate someone or else or be the recipient of compensation.

The amount of compensation to be paid under either s32F(1) or s32F(2) is to be determined by agreement of the parties involved or, where no agreement is possible, by the Authority responsible for implementing the management plan the dispute arose under (s32F(3)).

Local councils should be aware that the Minister has several powers relating to state observation bores. The Minister can authorise a person's entry onto Crown land for the purposes of carrying out observations or 'operating, maintaining, altering or decommissioning the bore' (s33A(1)). If pecuniary loss or expenses are incurred by the local council as a result of this entry the Minister is, again, liable to compensate the local council for that loss or expense (s33B).

It is also a criminal offence for a Council to destroy, damage, remove, alter or interfere with a State observation bore (s33D). For a first offence, the punishment can be up to 20 penalty units ($3223.8 until 30 June 2019) or 3 months of imprisonment. For a second offence, the punishment can be up to 40 penalty units ($6447.6 until 30 June 2019) or imprisonment for 6 months.

Part 3A—Water Shares

Part 3A determines water share allocations. Where a system has been declared by the Governor in Council as a 'declared water system' under s6A, it is an offence to take water from a waterway, aquifer, spring, soak, or dam in that system without authorisation (s33E). This excludes water taken from a spring, soak or dam for domestic and/or stock use (s33E(2)(a)). This is punishable by 60 penalty units or imprisonment for 6 months for a first offence or 120 penalty units or imprisonment for 12 months for subsequent offences.

In order to be 'authorised' in the taking of water under the Act, a person must be the holder of a 'water share.' A 'water share' authorises the holder to take a certain volume of water (called the 'water allocation' during the water season ('any period of 12 calendar months beginning on 1 July in any year and ending on 30 June in the following year').

There are two ways in which a local council can get a water share:

1. Make an application under s33L(1). This application requires the local council to specify which water system the share is meant to apply to and (because a local council water share would be held by more than one person) must also specify whether the joint water share will be held as joint tenants or as tenants in common (s33L(2)).
2. Enter into a contract of sale for the water share under s33P. Under this section, the Minister can sell a share via auction, tender, or any other manner they consider necessary (s33P(1)), provided the Minister has first undergone the necessary public notification requirements (s33P(2)).

When considering whether to issue a water share, a Minister must consider several issues specified in s33G. Note none of these issues are specifically about climate change, though the need to 'protect the environment' does feature. Where the area applied for is also subject to a bulk entitlement or permissible consumptive volume, the Minister should consider whether the issue of a share would be consistent with the bulk entitlement or the permissible consumptive volume (if any exist) for that area (s33J(1)(a)). The Minister should also consider the effect issuing the water share will have on other water shares already existing within the system, any environmental entitlements, and the needs of other potential applicants (s33J(1)(b)).

On issuing a water share, the Minister must specify: whether the share is to be held as joint tenants or as tenants in common; whether the share is an associated water share; what Authority (if any) is responsible for providing services in respect of the water share (s33H). If the share in question *is* an associated water share, the Minister must also specify which land it applies to and whether it is a water-use licence or water-use registration that applies.

An 'associated water share' is a water share over land that is also specified in a water-use licence or a water-use registration (s33AL(1)). A 'water-use licence' is a licence, granted by the Minister in response to an application from an *owner*, that authorises the use of water on their land for the purposes of irrigation (s64L). A 'water-use registration', granted by the Minister in response to an application by an owner *or* occupier, authorises the use of water on that person's land for purposes other than irrigation (s64AP).

A Minister is compulsorily required <u>not</u> to issue a water share if issuing the share would conflict with an approved management plan, the permissible consumptive volume, or any bulk entitlements for that area (s33I(2)).

The Minister must defer (but not necessarily deny) applications where the area applied for is being considered as a possible water supply protection area (s33N) <u>and</u> where the application has been made under s33L (not to water shares acquired through a contract for sale). Variations and dealings with water shares are covered in Part 3 Divisions 4 and 5 – this includes transferral of property rights in water.

Part 4—Allocation of Water

Part 4 sets out requirements for licensing, which may be of importance to local government.

Part 6—Water Corporations

Part 6 sets out powers for Water Corporations; it is largely irrelevant to local councils as it outlines the procedures for establishing water corporations as well as their powers, functions and responsibilities. The only thing of note is that someone can simultaneously be a member of a water corporation and a local council under s119(2)(c). There may also be some latent importance regarding public boards directors' duties.

Part 6A—Districts and Land Management Areas

Part 6A outlines the process for creating irrigation, sewerage, water, and waterway management districts. The creation of these districts triggers a series of responsibilities by the Authority assigned to them. Although local councils themselves do not have any obligations under this section, it is useful for them to be aware of the process of forming and governing these areas, as the Authorities will largely be responsible for the delivery of relevant services in the local council's areas. In the table below, the entities listed in 'Column 1' are the new 'Authorities' that replace the 'Former Water Authorities' listed in Column 2 and have power under the Act (s122G(1)). The previous powers of Catchment Management Authority continue (s122G(2)).

Column 1: Water Corporations	**Column 2: Former Water Authorities**
Barwon Region Water Corporation	Barwon Region Water Authority
Central Gippsland Region Water Corporation	Central Gippsland Region Water Authority
Central Highlands Region Water Corporation	Central Highlands Region Water Authority
Coliban Region Water Corporation	Coliban Region Water Authority
East Gippsland Region Water Corporation	East Gippsland Region Water Authority
First Mildura Irrigation Trust	First Mildura Irrigation Trust
Gippsland and Southern Rural Water Corporation	Gippsland and Southern Rural Water Authority
Goulbourn—Murray Rural Water Corporation	Goulbourn—Murray Rural Water Authority
Goulbourn Valley Region Water Corporation	Goulbourn Valley Region Water Authority
Grampians Wimmera Mallee Water Corporation	Grampians Wimmera Mallee Water Authority
Lower Murray Urban and Rural Water Corporation	Lower Murray Urban and Rural Water Authority
Melbourne Water Corporation	Melbourne Water Corporation
North East Region Water Corporation	North East Region Water Authority
South Gippsland Region Water Corporation	South Gippsland Region Water Authority
Wannon Region Water Corporation	Wannon Region Water Authority
Western Region Water Corporation	Western Region Water Authority
Westernport Region Water Corporation	Westernport Region Water Authority

The waterway management district of the Melbourne Water Corporation is specifically delineated by the red on the plan lodged in the central plan office and numbered LEGL./05-406 (s122H(1)). The Minister may add to or diminish this area of land by publishing a notice in the Government Gazette (s122H(2)).

Where such a declaration is made, any rights, property, and assets that are specified in the Minister's determination; any debts, liabilities, and obligations; and any previous contracts or arrangements are deemed to be vested in the body which has received the new land (s122I(2)). The new body is also liable to pay for the transfer of any right, property, or asset at an amount agreed on with the old body or at the amount determined by the Governor in Council (s122I(3)).

Division 3 outlines the methods for creating or extending water, sewerage, irrigation and waterway management districts. Note that Division 3 does not apply to the Melbourne Water Corporation (s122L).

An Authority can also establish a new district or extend an old one. By application to the Minister an Authority can apply to either (s122M):

- Establish a new sewerage or water district; or
- Extend an existing sewerage, water, irrigation or waterway management district.

The Minister will issue guidelines about the form the application must take (s122O(1)). Authorities must follow these guidelines unless otherwise exempted by the Minister (s122O(2)).

An Authority cannot apply to establish or extend a district unless they have received approval by the Minister in writing to do so (s122N(2)). An Authority cannot apply to establish or extend a district where a part or whole of the proposed area is already within the area of interest of another Authority (s122N(1)).

When submitting an application, the Authority has a number of procedural requirements it must follow. The Authority must give notice of the proposal to establish or extend to: all local councils that are affected by it; any other person who the Authority reasonably believes may be affected and; any other person who the Minister has directed the Authority should give notice to (s122P(1)(a)). Where the Authority is applying to extend a district, the Minister has the power to exempt the Authority from notifying these parties (s122P(3)).

This notice must state that the Authority invites submissions on the proposal, that any submission made should set out the grounds on which it is made and give a deadline by which all submissions should be made (s122P(2)). Any person affected by the Authority's proposal is able to make a submission to it (s122Q(2)). Although the Authority must consider all of the submissions (s122R(3)) there is no obligation for the Authority to vary the proposal as a result of the submissions (s122R(1)).

The Authority must also make the proposal available to the public in a number of ways:

- The proposal must be made available for inspection free of charge at its office during the Authority's office hours (s122P(1)(b)).
- The proposal must be published at least once every week for 3 consecutive weeks in a newspaper that circulates generally in the area to which the proposal relates (s122P(1)(c)(i)).
- The proposal must be published in the Government Gazette (s122P(1)(c)(ii)).

The Minister can choose to approve the proposal, with or without changes, or to refuse it (s122S). If the Minister chooses to approve a proposal, they must declare it by notice published in the Government Gazette (s122T).

The Act also provides for the creation of 'areas of interest'. An area will be an 'area of interest' where it is an area of land outside of that Authority's districts and has been so declared by the Minister in the Government Gazette (again, in response to a request by the Authority for whom the area is declared) (s122U).

In order to make such a declaration the Minister must ensure that the Authority has followed the appropriate procedural requirements: giving a minimum of 30 days notice to any affected public statutory body, publishing the proposed declaration in a newspaper that circulates generally throughout the affected area and otherwise consulting public statutory bodies which may be affected (s122V).

Where an area of interest is declared, the Authority will gain various powers (s122W(1)):

- For a water district, the Authority can 'carry out any water supply functions (other than irrigation functions) or exercise any water supply powers (other than irrigation powers) in relation to that area of interest'.
- For a sewerage district, the Authority can 'carry out any sewerage functions or exercise any sewerage powers in relation to that area of interest'.
- For a waterway management district, the Authority can 'carry out any waterway management functions or exercise any waterway management powers in relation to that area of interest'.

Part 10—Waterway Management

Part 10 sets out some relevant provisions for local councils, for waterway management. Division 2 specifies that once an Authority has declared a waterway management district, it must 'identify and plan for State and local community needs relating to the use and to the economic, social and environmental values of land and waterways' (s189(1)(a)) and develop and implement programs, schemes, and works that will meet those needs.

In doing so, an Authority has several powers and obligations. For example, the Authority has the power to 'close, permanently or for a specified period, the access of people, animals or vehicles to the whole or any part of a designated waterway or designated land or works' (s193(1)). Before doing so, the Authority must obtain the landowner's consent (s193(3)) and comply with publication requirements (s193(6)).

Should local council land be subject to such an order they can apply for a review of the decision in the Tribunal (s193(7)), provided it is within 28 days of the decision or within 28 days of when the statement of reasons was given (s193(7A)).

The local council cannot interfere with any of the works undertaken as part of this program (s194) or cause any drainage works to be connected or discharge (s195).

The Authority also has additional powers to require the owner of property within the waterway to contribute to or pay the costs of works (s196) or where the work results in increased use of services by that property (s197).

Part 12—Access over Lands

Part 12 governs the protocols local councils have to follow in order to gain access to another's land for the purposes of drainage, water supply or salinity mitigation purposes.

A local council can gain access over another's lands by giving the owner and occupier (if the occupier is not the owner) notice, and trying to arrange access by agreement under s234. Such an agreement will need tospecify the amount and type of compensation (if required), describe the access agreed to, and includes a map of the land. Where no agreement can be made within

one month of notification, the local council can apply to the Minister, who will appoint an authority to decide the issue (s235). Regardless of the method, an agreement to grant access is not effective until registered and lodged appropriately (s236).

The parties can revoke or vary this agreement by the same methods (above outlined) used to create an original agreement, or the parties can make a new agreement altogether (s237(1)). Where no agreement can be made within one month of notification, the local council can apply to the Minister, who will appoint an authority to decide the issue (s237(2)).

The owner of land in favour of which a right of access is created may enter the relevant land to install, remove, alter, or maintain any works on the land that are necessary for the use of the right of access (s238(1)). If the owner fails to maintain the land or installations, the entering party may complete the maintenance and recover costs from the owner after giving 14 days notice (s238(2)).

The owner of land in favour of which a right of access is created may, subject to this Part, do anything necessary to construct, maintain and alter works in the relevant land, including breaking up the surface of any road (s239(1)). Before breaking up the surface of a road, the owner must give 14 days notice to the person responsible for maintaining the road (possibly local government) or risk a punishment of up to 10 penalty units (s239(2)).

Part 14 outlines a series of offences that the local council must not commit in order to avoid criminal liability, as follows:

Section	Offence	Penalty
s288	Do not interfere (destroy, damage, remove, alter or in any way interfere) with the Authority's works or property.	First offence: 60 penalty units or 6 months imprisonment Subsequent offence: 120 penalty units or 12 months imprisonment
s289	Do not take, use or divert water or water flows under the control of the Authority.	First offence: 60 penalty units or imprisonment for 6 months. Subsequent offence: 120 penalty units or imprisonment for 12 months.
s290	Except in an emergency, do not open any ground and thereby uncover or expose any works belonging to or under the control and management of an Authority without the Authority's permission or 5 days written notice.	10 penalty units.
s291	Do not wilfully trespass on the land or premises of an Authority.	10 penalty units.
s291C	Do not impersonate an authorised water officer.	60 penalty units.
s291D	Do not refuse to state the name and address or state a false name and address when required by an authorised water officer. (An authorised officer may ask for a name and address when they have reasonable grounds to believe that the person has convened or is convening an offence under the area by-laws).	10 penalty units.
s292(2)	Do not obstruct, threaten, abuse, insult or intimidate: an officer of the Authority or someone assisting an officer and / or any person lawfully performing duties under this Act.	20 penalty units.
s293(2) s294(2)	Do not refuse to state the name and address or state a false name and address when required by an officer of an Authority or member of the police force. (An officer	10 penalty units.

	of an Authority or member of the police force may ask for a name and address when they have reasonable grounds to believe that the person has convened or is convening an offence under this Act under s293(2) or when they are inquiring as to the owner of land or premises (s294(2)).	