

Legal Liability and Legal Risk Management Strategies for Acting on Adaptation

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Introduction

"As the financial impacts of climate change and adaptation begin to be recognised, we are likely to see the use of litigation as a means to recover costs ... courts will examine claims and may decide it was reasonable, at the time the decision was made or advice given, to have foreseen the impacts of climate change, based on the information available in the public domain."

(Downden M (2005) The forecast predicts legal liabilities. Estates Gazette)

Liability Overview

Do nothing or act overcautiously – both can lead to future liability issues. For example:

- If you do nothing and a development is approved and in the future is subject to damage as a result of sea level rise/storm surge, it could be argued that you failed in your statutory duty to ensure the site was suitable for its intended use and development.
- If, on the other hand, you act overcautiously and refuse an application or fail to make a decision based on inadequate information, you may be subject to a legal challenge for failure to appropriately deal with the application (e.g. by seeking better information).

2 principles causes of action:

- Negligence
- Nuisance

Negligence

Establish a duty of care, breach of duty of care and breach resulted in the damage or loss suffered by the party.

Difficulty in showing Council's act "caused" the damaged complained of.

- **A Council must be in a position where they have a significant and special measure of control over a situation that resulted in the loss or damage.** For example, Council's control over approving planning permit application. Concepts of control/vulnerability.
- **The Council must have known or ought to have known of the risk of harm to the plaintiff or a class of persons including the plaintiff.** Concepts of knowledge/proximity. 'Tipping point' for knowledge on climate change and its effects.
- **The Court is required to consider a Council's financial capacity when assessing whether there has been a breach of duty.**

Defences

Victoria: *Wrongs Act* raises the threshold for determining whether a statutory duty of care has been breached. Not blanket protection. Only applies to breaches of statutory duties. There are functions that Councils exercise that may result in a breach of duty that is not a statutory duty and therefore would not be afforded the protection from the provisions of the *Wrongs Act*. Courts will apply the provisions and protections narrowly.

NSW: *Local Government Act 1979* – exempts Councils from liability for negligence re flooding and coastal hazard. *Civil Liability Act 2003* – high water mark – Councils only breach if act "so unreasonably".

Nuisance

Where a person's right to use and enjoy their land is interfered with (private nuisance) or the community's comfort or convenience is interfered with (public nuisance) as a result of the actions or inactions of Council.

Material damage or injury and that the risk was foreseeable.

An example of a potential cause of action includes the damage from floodwaters running on to private property in circumstances where:

- The risk was foreseeable due to Council's knowledge of increased risk of heavy rain/cyclone events as a result of climate change; and
- Where Council has failed to prevent the risk through the provision of appropriate infrastructure.

Rick Management Strategies



- Legal imperative for local government to understand the impacts of climate change risk faces by their municipality and to develop appropriate mitigation and adaptation mechanisms to manage climate change risk.
- Conduct thorough scientific and strategic research.
- A responsibility to implement policies and strategies to mitigate climate change impacts.
- Ensure that new development proposals respond adequately to such impacts.
- Adopt clear climate change management plans, appropriate building standards, appropriate conditions in permits and development zones – *Coastal Protection Act 1979*

Adaptation



Summary of Climate Change Impacts on Australia

CLIMATE VARIABLE	POTENTIAL IMPACT	VULNERABLE COMMUNITIES
Temperature	<ul style="list-style-type: none"> • Increased risk and incidence of bushfires – the number of days of very high and extreme fire danger increasing across the country. • Increase in extreme weather events such as floods and droughts. • Impacts on ecosystems. 	<ul style="list-style-type: none"> • Generally an increase in fire danger throughout Australia. • Settlements, industry and infrastructure vulnerable to adverse effects of weather. • Changes in biodiversity across Australia. • Loss of coastal wetlands.
Sea level rise	<ul style="list-style-type: none"> • Increased vulnerability to coastal erosion. • Inundation of coastal lowlands. • Impacts on coastal habitats due to changes in tidal inundation. • Increased risk of damage to coastal infrastructure. • Reductions in water quality in coastal rivers. • Saltwater intrusion of estuaries and aquifers. 	<ul style="list-style-type: none"> • Coastal settlements of Queensland. • Low islands of the Torres Strait. • New South Wales coasts. • Especially under storm tides in Port Phillip, Western Port and Gippsland Lakes. • Floodplains of northern Australia. • Riverine environments.

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Potential Impacts of Climate Change on Local Government Function

ASSETS/SERVICE DELIVERY	POSSIBLE CLIMATE CHANGE IMPACTS
Infrastructure and property services	
Road/pavement construction and maintenance	<ul style="list-style-type: none"> • Changes in rates of deterioration – faster deterioration in wetter areas but potentially slower deterioration in areas where rainfall decreases. Deterioration may also result from higher temperatures and increased solar radiation. • Inundation of surface and/or underground roads in coastal areas, potentially resulting in destruction. • Changes in frequency of interruption of road traffic from extreme weather events and emergency transport routes disrupted.
Stormwater/drainage	<ul style="list-style-type: none"> • More intense rainfall resulting in inflow and infiltration into wastewater networks. • Exceedance of existing flood defenses. • Exceedance of drainage capacity. • Reduction in drainage capacity due to sea level rise and storm surge. • Changes in insurance and peak stream and river flows. • Lower levels of rainfall, reducing pressure on stormwater systems.

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Potential Impacts of Climate Change on Local Government Function

ASSETS/SERVICE DELIVERY	POSSIBLE CLIMATE CHANGE IMPACTS
Infrastructure and property services	
Buildings	<ul style="list-style-type: none"> • Changes in building heating/cooling costs (can be either negative or positive). • Increased risk of damage from bushfires. • Changes in frequency of wind, rain, hail, flood, storm events and damage, potentially resulting in destruction. • Cyclone damage and destruction due to changes in wind intensity. • Higher rates of building deterioration and associated maintenance costs.
Coastal infrastructure	<ul style="list-style-type: none"> • Increased coastal erosion and inundation. • Increased frequency or permanent inundation of coastal infrastructure and utilities, e.g. water, sewerage, gas, telecommunications, electricity, transportation. • Destruction, damage and disturbance to Council-managed marinas and boat ramps. • Increased erosion and/or exceedance of seawalls, jetties and other coastal defences.

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Potential Impacts of Climate Change on Local Government Function

ASSETS/SERVICE DELIVERY	POSSIBLE CLIMATE CHANGE IMPACTS
Planning and development approvals	
Planning policy and developments	<ul style="list-style-type: none"> • Inappropriate location of urban expansion areas. • Increased uncertainty in long-term land-use planning and infrastructure design, i.e. location of future developments, suitability of infrastructure designs to cope with changing climate, etc. • Cost of retrofitting of systems. • Loss of private property and community assets. • Increase in insurance costs. • Increased pressure on disaster management and response resources. • Early retirement of capital infrastructure.

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4.1 GENERAL THEMES OF ADAPTATION ACTIONS

POLICY

- Undertake a risk assessment for the local government area to identify the most significant areas of risk and to establish priorities
- Incorporate potential climate change adaptation actions into strategic planning where appropriate.

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Table 4: Adaptation Actions for Property and Infrastructure Services

IMPACT	ADAPTATION ACTION	BENEFITS (ECO/ENVIRO/SOCIAL)	COSTS	TRANSFERABILITY IN AUSTRALIA/ EXAMPLES OF EXISTING INITIATIVES
Infrastructure development, provision and maintenance				
<ul style="list-style-type: none"> All climate change impacts 	<ul style="list-style-type: none"> For infrastructure developments with a lifetime greater than 50 years, design for staged construction to allow future climate change impacts to be taken into account 	<ul style="list-style-type: none"> Opportunities to take into account other (non-climate related) improvements to the infrastructure. 	<ul style="list-style-type: none"> Likely to be a more expensive option, or not technically feasible in some construction projects. 	<ul style="list-style-type: none"> Relevant for infrastructure design and construction works approved or undertaken by local government. Relevant guidelines could be included in Council specific design manuals, noting that these are often reference to Australian Design Standards.

Source: Department of Climate Change

Questions



EVERYTHING MATTERS

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