



Legal risk and adaptation

Information Manual 6

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Legal Risk. A guide to legal decision making in the face of climate change for coastal decision makers

Information Manual 6

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Preface

In 2014, the National Climate Change Adaptation Research Facility (NCCARF) was commissioned by the Australian Government to produce a coastal climate risk management tool in support of coastal managers adapting to climate change and sea-level rise. This online tool, known as CoastAdapt, provides information on all aspects of coastal adaptation as well as a decision support framework. It can be accessed at www.coastadapt.com.au.

Coastal adaptation encompasses many disciplines ranging from engineering through to economics and the law. Necessarily, therefore, CoastAdapt provides information and guidance at a level that is readily accessible to non-specialists. In order to provide further detail and greater insights, the decision was made to produce a set of Information Manuals, which would provide the scientific and technical underpinning and authoritative nature of CoastAdapt. The topics for these Manuals were identified in consultation with potential users of CoastAdapt.

There are ten Information Manuals, covering all aspects of coastal adaptation, as follows:

1. Building the knowledge base for adaptation action
2. Understanding sea-level rise and climate change, and associated impacts on the coastal zone
3. Available data, datasets and derived information to support coastal hazard assessment and adaptation planning
4. Assessing the costs and benefits of coastal climate adaptation
5. Adapting to long term coastal climate risks through planning approaches and instruments
6. Legal risk. A guide to legal decision making in the face of climate change for coastal decision makers
7. Engineering solutions for coastal infrastructure
8. Coastal sediments, beaches and other soft shores
9. Community engagement
10. Climate change adaptation planning for protection of coastal ecosystems

The Information Manuals have been written and reviewed by experts in their field from around Australia and overseas. They are extensively referenced from within CoastAdapt to provide users with further information and evidence.

NCCARF would like to express its gratitude to all who contributed to the production of these Information Manuals for their support in ensuring that CoastAdapt has a foundation in robust, comprehensive and up-to-date information.

Disclaimer

This Information Manual has been commissioned by the National Climate Change Adaptation Research Facility (NCCARF). The manual acts as a document to assist decision-makers in understanding the steps they should take to minimise their risk of legal action in the face of climate change (climate legal risk) in coastal regions of Australia. The views and opinions expressed in this publication are those of the authors and do not necessarily reflect those of NCCARF.

The manual is based on publicly available information and internal working documents of the authors. While reasonable efforts have been made to ensure that the contents of this publication are factually correct, the authors do not accept responsibility for the accuracy or completeness of the contents. The manual may not be relied on in whole or in part by any person as an indemnity against liability, and the contents may not be disclosed in whole or in part without the consent of NCCARF. It is important to note that comments made in the manual should not be construed as legal advice, and where questions arise legal advice should be sought to determine questions relevant to the local context.

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Overview

The purpose of this manual is to help you (as a coastal decision-maker) identify functions and decisions that may give rise to legal risk and to provide some guidance on how to manage these risks. In particular, the manual is concerned with legal risk as it applies to decisions about **climate change adaptation**.

The manual is divided into two sections. You should read the first section to get an understanding of the types of legal challenges that governments may encounter. This section is titled **Climate legal risk**. It sets out the main categories of legal challenges you may be faced with in various contexts. These include decisions about development approvals, planning schemes and release of hazard maps. This section will give a brief overview of the legal risks that may arise from these types of decisions.

You should then consider the second section to determine how to factor these possible challenges into decision-making. This section is entitled **Decision-making**, and it aims to provide you with a framework to use when deciding how to manage these risks. This framework encourages you to think about uncertainty, both in the law and in the facts, and consider whether there are any steps that can be taken to reduce this uncertainty. It also encourages you to undertake these thought processes early and strategically, rather than reacting to issues as they arise.

This section breaks down the thought process into three key questions:

1. Do you have power to make a decision?
2. Do you have certainty regarding the facts? If not, can you get additional information?
3. Do you have certainty regarding the law? If not, can you seek further advice?

This section then has a series of hypothetical examples of this process in play in relation to the type of decisions you need to make (e.g. whether to approve a development). Although these examples contain fictional law, they may be useful in terms of showing you the process to go through in gathering your own legal and factual information.

By actively thinking through these issues, you can ensure that you are making decisions using the best information available. Unfortunately, you cannot avoid all legal risk and completely remove uncertainty. However, legal risks can be managed through early decision-making, with regard to the best available science, incorporating a full consideration of all relevant issues.

Introduction

Decision-makers – many of whom may have only limited training or access to information about climate change – may find the task of making decisions that affect or are affected by climate change extremely challenging. The challenge is made even more difficult when decision-makers are required to consider the legal consequences of the decision, more specifically, whether there is the risk of legal claims against the decision-maker or decision-making body. Section 1 of this manual will provide a summary of the main climate change adaptation decision-making contexts in which these risks may arise.

Section 2 of the manual builds on this and provides a framework for decision-makers to follow to minimise and manage these legal risks. This framework acknowledges that precise determination of all long-term risks of climate change is currently all but impossible. Equally, much of the law in this area is constantly evolving and changing. The manual acknowledges this uncertainty, and encourages decision-makers to seek further information and advice where possible.

That said, it is conceivable, and in fact likely, that a decision will be required in a situation where all avenues to better information or increased certainty are closed (e.g. perhaps because of a lack of resources). It is then up to the decision-maker to determine whether the risk can be accepted given the gap in knowledge. If it cannot, it may be possible to transfer the risk; for example, the risk may be insurable. The purpose of the manual is to guide the decision-maker through this process rather than to supply the decision. The decision-maker must call upon experience, skills and available information to determine the position or alternative they will choose to adopt.

In providing a generic decision-making process, the manual is jurisdictionally independent, and the decision-maker will need to consult their own state and local laws in making decisions. For example, a decision in New South Wales must consider both the unique factual situation and the legal regime applicable in the state. The same applies to a decision-maker located in Tasmania. Therefore, while the process remains the same, outcomes may differ between jurisdictions. While Section 2 of the manual contains examples of decision-making processes, decision-makers must be very careful to consider their own statutory context and seek appropriately targeted legal advice.

1 Climate legal risk

In this manual, we use the term climate legal risk to refer to the risk that an organisation or individual may pursue litigation against a decision-maker on grounds related to climate change. The purpose of this section of the manual is to outline the main areas of climate legal risk for government, with a specific focus on climate legal risk related to climate change adaptation.

1.1 Risk of legal challenge – general

Litigation related to climate change adaptation is likely to arise under one of two main areas of law: administrative law or tort law. Administrative law is the body of law that allows citizens to challenge decisions made by government officials. Tort law includes negligence and nuisance, which may allow a citizen to seek a remedy where a careless action, inaction or decision by a government results in loss.

Administrative law risk is likely to be short-term: a government makes a decision concerning a development, and a developer, neighbour, community group or other group may challenge that decision. In contrast, the risk of negligence and nuisance proceedings may be longer term: a government may approve a development, then be sued in negligence 50 years later, once hazard impacts start to materialise. In another example, a government may construct stormwater infrastructure and be sued in nuisance 20 years later when the stormwater system fails and floods a private property. Decision-makers must therefore be sensitive to both the short-term and long-term legal risks associated with decisions.

More information on administrative law and tort law is contained in Box 1 below.

Box 1 Description of administrative law and tort law.

1.1.1 Administrative law

Administrative law provides citizens with rights to challenge decisions made by government officials. Depending on the relevant statutory context, the right of challenge might be **merits review** or **judicial review** (see Table 1).

Merits review is a broader type of review, whereby the judge gets to 'stand in the shoes' of the original decision-maker, consider the evidence and the law afresh, and make a new decision. A right to seek merits review must be specifically given by a statute (e.g. planning legislation), and the statute may only grant the right to certain persons (e.g. an applicant for a development approval, or someone who made a submission during the decision-making process). Decision-makers should consult their enabling legislation to determine whether any merits review rights are granted.

In contrast, **judicial review** is a narrower form of review. It allows the judge to consider only whether the decision-maker followed correct statutory procedures, and acted within their authority. For example, if a statute prescribes that the decision-maker must refer to specific documents before making a decision, and there is evidence that this did not occur, judicial review may be sought of the decision. A right to seek judicial review is granted either generally by the common law (judge made law) or specifically by judicial review legislation (e.g. the Judicial Review Act 1991 (Qld)). Generally, a person will have a right to seek judicial review of a decision if their property, business or economic interests will be affected by that decision. Interest groups (e.g. conservation groups) do not have an automatic right to challenge decisions on public interest grounds, although a court may decide that their organisation has a sufficient interest in the

Box 1 Description of administrative law and tort law - *continued*.

subject matter. Alternatively, some states have specific legislation that entitles any party to seek judicial review of a decision. On the flipside, some states have specific legislation that excludes any general law rights to seek judicial review. Again, a decision-maker should consult their specific statutory framework to ascertain whether there are any rights granted to various parties to seek judicial review of their decisions.

To demonstrate the variability among states in terms of rights to administrative law challenge, the following table lists the rights granted under state planning laws to review decisions related to development approvals.

This highlights the variability among jurisdictions and supports the need for decision-makers to seek advice regarding the legal arrangements within their jurisdiction.

Table 1 The rights granted under state planning laws to review decisions related to development approvals. Source: Bell 2014, p. 175.

	Merits review	Judicial review
Queensland	Applicants Submitters (limited)	Any person (declaration rather than JR)
New South Wales	Applicants Objectors (very limited)	Any person
Victoria	Applicant Objector Person who is affected	Any person
Western Australia	Applicant	General law rights
South Australia	Applicant Person who made representations (limited)	General law rights
Tasmania	Applicant Person who made a representation	General law rights
Northern Territory	Applicant Submitters (limited) Hybrid merits review/judicial review	

Box 1 Description of administrative law and tort law - *continued*.

1.1.2 Tort law – negligence

A 'tort' is a civil, as opposed to a criminal, wrong. Rather than giving rise to a finding of guilt or overturning the decision-maker's decision, a successful action in tort will give rise to an order for compensation in the form of monetary damages.

The main tort relevant to government decision-making is **negligence**. Negligence essentially consists of three elements: a duty of care was owed; that duty of care was breached; and this breach caused damage.

Generally speaking, a public authority such as a local government may be found to owe a duty of care to a landholder. Under tort law legislation in place in all jurisdictions except for the Northern Territory, a person does not breach a duty of care unless:

- the risk was foreseeable
- the risk was not insignificant
- in the circumstances, a reasonable person would have taken precautions.

In deciding what precautions a reasonable person would have taken, the court will consider the probability that the harm would occur if care were not taken, the likely seriousness of the harm, the burden of taking precautions to avoid the risk of harm and the social utility of the activity that creates the risk of harm.

Finally, demonstrating that the public authority caused harm involves a consideration of causation (i.e. that the public authority's action was a cause of the harm) and evidence that some actual harm has occurred.

Most states also have statutory provisions in their tort law legislation that must be considered when determining the negligence liability of public authorities. These require the judge to consider the following factors:

1. 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 the functions
2. the general allocation of financial or other resources by the authority is not open to challenge
3. the functions required to be exercised by the authority are to be decided by reference to the broad range of its activities (and not merely by reference to the matter to which the proceeding relates)
4. the authority may rely on evidence of its compliance with its general procedures and any 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.

Essentially, these provisions recognise that public authorities may have limited resources and many different functions to perform. The provisions require courts to be realistic in their assessment of government liability, as government budgets simply do not stretch to cover every single function or service that may be desired by constituents.

Most states also have another statutory provision in their tort law legislation that appears to provide a limited defence for public authorities (generally restricted to the making of policy decisions), unless their decision was 'so unreasonable that no reasonable' decision-maker would have made it. The utility of these so-called defences is seriously questionable (Bell and Barker 2016), and it would be prudent for public authorities to assume that their decisions are not immune from liability on the basis of these generic provisions.

Finally, the New South Wales *Local Government Act 1993* contains a very specific defence for public authorities. Under s 733, a local government does not incur any liability in respect of advice and actions regarding flood risk and coastal hazards, provided it was given or done in good faith. Note that there is no equivalent provision in other jurisdictions.

Box 1 Description of administrative law and tort law - *continued*.

1.1.3 Tort law – nuisance

Another tort that may be relevant to government action is nuisance. A private nuisance is 'an unlawful interference with a person's use or enjoyment of land, or some right over, or in connection with it' (*Hargrave v Goldman* (1963) 110 CLR 40, 49).

In a government context, a private nuisance claim may arise where some action or inaction on the part of government causes damage to someone's land.

Importantly, nuisance actions do not seem to be covered by the civil liability legislation discussed above (although this has not been comprehensively tested by courts), so resource constraints on the part of government may be less relevant in assessing liability.

1. *Civil Liability Act 2003* (Qld) s 9(1), *Civil Liability Act 2002* (NSW) s 5B(1), *Wrongs Act 1958* (Vic) s 48(1), *Civil Liability Act 2002* (WA) s 5B(1), *Civil Liability Act 2002* (Tas) s 11(1), *Civil Liability Act 1936* (SA) s 32(1).
2. *Civil Liability Act 2002* (Qld) s 35; *Civil Liability Act 2002* (Tas) s 38; *Civil Law (Wrongs) Act 2002* (ACT) s 110; *Civil Liability Act 2002* (NSW) s 42; *Civil Liability Act 2002* (WA) s 5W. See also *Wrongs Act 1958* (Vic) s 83.

1.2 Risk of legal challenge – decisions with climate change implications

A number of areas of government decision-making may give rise to climate legal risk. This section looks at what legal risks can arise at different decision points.

There are several points to note at the outset. First, this list of possible areas of climate legal risk is not exhaustive, and there may be other areas of decision-making that attract legal challenge – especially given the dynamic nature of climate change law. Second, some of these areas of decision-making are especially problematic, as climate legal risk may arise no matter what decision is made. In these circumstances, a decision-maker can only make the best decision possible on the information available. This may not prevent a matter from ending up in court, but may give the decision-maker a strong defence. Finally, some of these risks are short term in nature, whereas some are longer term. Decision-makers should be especially cautious to take a long-term approach to decisions, to prevent future government officials and constituents from having to bear the cost of inappropriate decisions.

1.2.1 Strategic planning

An area of core business for state and local government is strategic planning, that is, strategic decisions at the government level as to the type of development that may be permitted in particular locations. At the state government level, this may consist of legislation, regulations or policy. At the local government level, this is generally a planning scheme. A planning scheme will usually have statutory force (e.g. Queensland's Sustainable Planning Act 2009 states that a planning scheme is a statutory instrument – s 80).

There may be an argument that failure to account for climate change in these documents can be challenged. However, these challenges would be unlikely to succeed. It is a well-established principle of administrative law that a failure to enact legislation is not a reviewable decision. Nor is it something that could attract negligence liability, as courts have generally found high-level strategic policy exempt from negligence liability.

That said, while it is difficult to challenge these strategic decisions, specific decisions about individual developments may be challenged, and this will be discussed below at (d). For example, failure to consider sea-level rise in a planning scheme may not be subject to challenge, but failure to consider sea-level rise in a development application may give rise to legal risk.

Ultimately though, it may be good for governments to have a strategic policy stating what types of development will be permitted and in what locations. This will provide for consistency and predictability in decision-making, which may lower the risk of legal challenge in these individual cases.

1.2.2 Release of hazard risk information

A government may choose to release hazard risk information, for example, maps depicting areas likely to be affected by bushfire or sea-level rise. The legal risks associated with the release of hazard information are twofold: first, that the release will be challenged by landholders on the basis that the information, even if correct, has caused a decrease in their property values; second, on the basis that the information is incorrect and has caused loss. Both of these scenarios could give rise to potential challenges based on negligence liability.

Correct information, decrease in property values

A landholder may argue that a government negligently caused economic loss through the release of information that has reduced property values. This issue has not yet been considered by Australian courts, but Eburn and Handmer argue that a claim would be unlikely to succeed. This is because 'it is consistent with the policy of the law that risk information should be made available to allow people to make their own choices' (Eburn and Handmer 2012, p. 19). That is, the benefits of providing hazard information may outweigh the potential risk to property values. However, this cannot be stated with complete certainty until this issue is considered by a court.

Incorrect information

In contrast, negligence liability is a higher possibility where the hazard information released is incorrect. This is because it is reasonable to assume that persons accessing the information will rely on it for serious purposes and will therefore proceed on the basis that it has been checked for accuracy (see e.g. Christensen et al. 2008). Governments should therefore take care to ensure that the information provided is accurate.

However, this is often easier said than done, due to the layers of uncertainty inherent in risk information concerning natural hazards, particularly where these hazards may be exacerbated by climate change (Bell et al. 2014). Governments should aim to strike an appropriate balance between notifying the public of hazard risk, while communicating any uncertainty. Disclaimers may be appropriate in situations of high uncertainty to alert persons accessing the data to undertake their own inquiries (Bell 2014). In this scenario, hazard maps can be presented as more of a trigger for further inquiry, rather than a definitive statement as to areas that will be subject to hazard risk (Bell et al. 2014).

1.2.3 Failure to release hazard information

The flipside to the above analysis is that a legal challenge may arise if a government fails to provide information on potential hazards. Again, there are two different scenarios in which possible claims may arise: first, in circumstances where a government did not have risk information; second, in circumstances where a government had risk information, but failed to release it, perhaps due to the risk of legal challenges discussed above at (1.2.2).

Government does not have risk information

A landholder may commence legal proceedings on the basis that a government failed to obtain and make available information concerning risk. As a result, the landholder chose to develop in a risky area and subsequently suffered loss.

This is a scenario where the legislative protections discussed above in Box 1 will become relevant. In particular, a court may acknowledge the competing demands on a government's resources and, on this basis, may refuse to uphold a challenge based purely upon the allocation of government resources.

If the government does not have hazard risk information due to a genuine lack of funds, and decides to allocate funds elsewhere, a successful challenge to this decision is unlikely.

Government has risk information, but fails to release it

In contrast, a failure to disclose information that a government does have in its possession may, in some circumstances, be classified as negligent misstatement. This is particularly so where the information is specifically requested. If a person requests information for a serious purpose and the other party has control of the information, a duty may arise to disclose it (see *L Shaddock & Associates Pty Ltd v Council of the City of Parramatta* (1981) 150 CLR 225). If a government has possession of hazard risk information and receives a request to disclose it, a failure to do so may breach this duty to disclose and amount to negligent misstatement. Legal advice should be sought in these circumstances.

It is less likely that a failure to release hazard risk information to the public generally will be negligent.

1.2.4 Development approvals

When making a decision about a particular development approval, a decision-maker may have some possible risk of short-term legal challenge (likely in administrative law) regardless of what decision is ultimately made: a decision to refuse development may invoke a challenge from a developer, while a decision to approve development may invoke a challenge from a neighbour, community member or interest group, or a developer if the conditions are not satisfactory to them. The statutory regime in each jurisdiction must be considered to determine which parties have a right of legal challenge, and whether this challenge involves merits or judicial review (see Table 1). There is also a risk of long-term legal challenge: for example, if a property is affected as a result of a climate change-related hazard, a landholder may commence proceedings against a government in negligence.

Administrative challenge

There have been some merits review challenges of decisions related to sea-level rise. It is difficult to place much precedential value in merits review cases, as the precise legal framework is crucial and may be different from state to state. However, there are some interesting lessons to note.

In *Northcape Properties Pty Ltd v District Council of Yorke Peninsula* [2007] SAERDC 50, the Environment, Resources and Development Court upheld a local government's decision to refuse an 80-lot subdivision on the basis that it failed to meet the objectives of the Council's development plan. This case may indicate that a local government may be more likely to succeed in this type of challenge in circumstances where there is a specific law or policy supporting or underpinning their decision.

In *Gippsland Coastal Board v South Gippsland SC* (No 2) [2008] VCAT 1545, the Victorian Civil and Administrative Tribunal overturned a decision of a local government to grant six development permits, for reasons including future sea-level rise. This was the case even though sea-level rise risk had not yet been implemented into planning law as a relevant consideration. This demonstrates that in circumstances where there is no law specifically addressing a hazard risk, a court may still uphold a challenge on the basis of hazard risk. However, the outcome is entirely dependent upon how a court interprets expert evidence.

In summary, a court conducting a merits review is bound to follow the law, but if there is no law, then the court may also consider expert evidence. This suggests that addressing hazard risks in law may give decision-makers greater certainty.

Recall that judicial review is more limited in its scope, and the applicant must point to some particular defect in the decision-making process. *Walker v Minister for Planning* [2007] NSWLEC 741 (*Minister for Planning v Walker* [2008] NSWCA 224 on appeal) is an example of judicial review. The applicant argued that the Minister had failed to consider ecologically sustainable development (which was an object of the relevant legislation – see Appendix for definition) in making a decision to approve development. The Court of Appeal ultimately found that ecologically sustainable development was not a mandatory consideration under the legislation, and therefore it could not

overturn Council's decision on the basis it failed to consider it.

In judicial review proceedings, the wording of any relevant legislation will be critical. However, even if a council has a statutory obligation to 'have regard to climate change' (or similar), this does not necessarily mean that they have to reject development that may be at risk; it simply means that they have to pay adequate attention to the climate change risks.

Negligence

There is no simple rule to apply to determine whether negligence liability will arise, but there are several factors that may be relevant.

The statutory context in which a decision is made is critical. If, for example, a decision-maker is not permitted to approve development unless satisfied it will not be subject to a particular hazard, this would tend towards a finding that a duty is owed.

The level of information that the government possesses will also be crucial. If a government has high-quality data concerning hazard risk and approves a development in a high hazard area, it may be more difficult to escape a finding of negligence. However, if a government does not have high-quality data due to, for example, financial restrictions, it may be reasonable for government to act on the information it does have in its possession.

Although legal outcomes cannot be predicted with any certainty, it would certainly be prudent for decision-makers to make decisions according to any scientific data and hazard risk information they have in their possession.

1.2.5 Protective infrastructure – provision or maintenance

A government is not obliged to provide infrastructure to protect against climate change hazards (e.g. a seawall). Recall that the statutory provisions governing liability in negligence state that the general allocation of financial or other resources by the authority is not open to challenge. Therefore, if a seawall (or other protective structure) is not built on the basis of resourcing decisions, this is unlikely to be considered negligent.

It is also unlikely to be considered a nuisance, because where a nuisance results from a natural occurrence (e.g. inundation from the sea), a defendant will not be expected to take impractical or unreasonable measures to prevent this occurrence. It is also difficult to establish that a council has control of the natural resource that caused the damage (Baker & McKenzie 2011).

In contrast, where a government does have control of a hazard, liability in negligence or nuisance may arise. For example, if a government does construct protective infrastructure or storm water infrastructure, it will need to maintain it. A failure to maintain may be considered negligence. This may be relevant in the following example: a council constructs a seawall, and this encourages landholders to develop behind it. The council fails to maintain the seawall, and it degrades. As a result, unexpected wave energy is experienced by the landholders, causing damage to their properties. In such a case, there may be a reasonable argument that the council was negligent for failure to maintain the wall.

There may also be an argument on the grounds of private nuisance. In *Bonnici & Anor v Ku-ring-gai Municipal Council* [2001] NSWSC 1124, intermittent stormwater incursion over an extended period of time amounted to a nuisance, in circumstances where the Council controlled the drainage system.

Governments should therefore be very cautious in the provision of protective infrastructure and pay particular attention to long-term maintenance and repair requirements for the structure.

1.2.6 Approval of private coastal protection works

A landholder may apply for development approval to construct a private coastal protection work (e.g. a seawall). Coastal protection works are a subset of development approvals generally and are usually regulated by general laws regarding approval of development. However, they are considered separately because the impacts of coastal protection works can be more widespread than the impacts of other types of development (e.g. houses).

As for other developments, though, a decision-maker may be the subject of legal challenge regardless of whether a proposal is approved or refused. A refusal of an approval may result in a landholder challenge to the decision.

However, governments should be cautious in approving a structure due to the possible impacts on other parties. Depending on the location and the type of coast, seawalls can also affect the transportation of beach material, which may cause adverse impacts for other coastal properties. If a government approves a seawall and the structure subsequently causes loss or damage to an adjacent property, that property owner may commence proceedings in negligence.

Furthermore, the decision-maker should also give careful thought to imposing maintenance obligations (Bell 2016).

1.3 Summary

Coastal decision-makers encounter legal risk at almost every point of the decision-making process. Although these risks may seem daunting to decision-makers, climate legal risk can be addressed and reduced through informed and holistic decision-making. The following section is intended to give some guidance on this process.

2 Decision-making

2.1 An overview

The object of this section is to provide a guiding framework that decision-makers can use to make informed and holistic decisions¹. By following the framework, decision-makers can expect to be better able to make legally robust decisions and alleviate the risk of litigation. Performed well, the holistic decision-making process provided can not only reduce legal risk, but also help build trust within the community, prevent harm and reduce surprise and distress if adverse events occur.

This decision-making framework supports **proactive decision-making**. Proactive decision-making is best explained by defining the opposite type of decision-making. Reactive decision-making involves a decision-maker addressing issues as they arise, for example, when a development application is made, or when a legal action is commenced in court by a developer/community group. Reactive decision-making is not a desirable approach, as a decision-maker then has to make important decisions under rushed circumstances.

Decision-makers should ideally consider both short- and long-term impacts of the issue under consideration as part of this proactive approach and assess uncertainties (e.g. sea level could rise by as little as 20 cm or as much 40 cm by the end of the century) and the risks they pose.

For a discussion of the definitions of 'climate change adaptation', 'risk', 'legal risk' and 'climate legal risk' refer to Appendix.

2.2 The climate legal risk decision-making framework

2.2.1 Overview

The aim of legal risk management is typically to avoid or at least minimise the legal risk or to transfer it (i.e. make someone else responsible for a legal risk, such as a developer or an insurer). Traditionally, management of legal risk has focused on the second of these, transfer of risk. When dealing with climate change, however, the focus shifts to minimising risk.

Making decisions based on legislative requirements and taking into account any relevant policy principles should reduce legal risk.

As previously mentioned, recognising and acknowledging uncertainty is key when considering climate legal risk. Because it may be impossible to achieve zero risk, we tend to think in terms of the level of **acceptability of risk**. Specifically, there are two general elements of potential uncertainty for decision-makers:

1. the facts
2. the law.

The facts may be uncertain, because climate change impacts remain uncertain; in many cases it may not be possible to determine whether the legal risk will indeed be transferable after the event materialises (e.g. sea level rises by a certain amount). The law may be uncertain because, in many cases, there are no clear legislative standards to guide government decision-making.

If there is certainty as to the facts and certainty as to the law, then we can expect the level of risk associated with the outcomes of the decision to be minimised or avoided. For example, if decision-makers can be confident that the information they have is complete and accurate, and they are certain as to how the law treats the obligations in respect of those facts, then they can confidently make appropriate decisions, thereby minimising legal risk.

If, however, there is some level of uncertainty as to the facts and/or the law, then it becomes difficult to assess the level of risk, making it more difficult to determine how to proceed, and how to assess the possibility of a litigious (court-based) outcome.

¹The works of Fisher (2013) and Peel and Ososky (2015) were fundamental to the development of the decision making process outlined in this manual.

If we break the decision-making process down to these two elements – factual and legal certainty – we can depict the decision-making process in terms of the diagram in Figure 1.

The climate legal risk decision-making flowchart steps the decision-maker through the legal decision-making process. Broadly speaking, there are three steps for the decision-maker to take:

- i. **Does the decision-maker have the power or authority to make a decision (heads of power)?** Identify the source from which the decision-making power is derived (e.g. from regulatory instruments). Understand the limits of the functions, responsibilities and duties vested in the decision-maker by that power. Understand any built-in immunities or exclusions of liability.
- ii. **Is there factual certainty?** Determine whether the factual information is sufficient to make the decision (e.g. whether the evidence used to establish the impacts is current and reliable). If not, seek further information.
- iii. **Is there legal certainty?** Determine whether there is sufficient legal certainty to make the decision (e.g. has the issue been given consideration by the courts?). If not, seek further advice.

If there is both sufficient factual and legal certainty, the decision-maker can make an assessment about the acceptability of the risk to take the proposed action.

If, however, the decision-maker is of the view that there is insufficient certainty as to the facts, the law or both, the decision-maker should consider whether it is possible to seek further factual information or further legal advice.

While the process will assist decision-makers in identifying the existence of risk and provide guidance as to what they can do once the risk is identified, it does not, and does not purport to, assist decision-makers in determining what is an acceptable or reasonable level of risk. That assessment must be made on a case-by-case basis and will depend on the risk appetite of decision-makers and their organisations.

To help explain the process in detail, we have provided seven hypothetical examples below that should cover most of the challenges councils face in decision-making for climate change.²



Figure 1 Climate legal risk decision-making flowchart. Source: Developed by Mark Baker - Jones.

² Note that the legislation and case law referred to in these hypothetical scenarios is fictional. A local government should seek advice as to its own statutory context before making any decisions.

Summary checklist

Prior to making any given decision, a decision-maker must:

- Determine the action or decision that needs to be made
- Determine the heads of power
 - Consider the relevant legislation or policies
 - Establish the extent and limits of their powers and responsibilities in respect of the proposed action
- Determine whether there is factual certainty
 - Clarify the objective of the action
 - Establish whether there is sufficient information to achieve the objective
 - If there is not sufficient information, consider changing the objective to increase certainty or, if that is not feasible, obtain further fact-related advice
- Determine whether there is legal certainty
 - Clarify the objective of the action
 - Establish whether there is sufficient legal certainty to achieve the objective
 - If there is not sufficient certainty, consider changing the objective to increase legal certainty, or obtain legal advice
 - Consider whether any legal immunities apply
- Make a decision or action once the acceptable levels of factual and legal certainty have been achieved

Scenario 1: Should a council undertaking strategic planning review include newly released state hazard information?

What is the action/decision to be made?

Council is reviewing their planning scheme.

Background

Fictional Bay Council has a statutory obligation to review their planning scheme every five years, and they are starting preparation for the next review.

The state government has released hazard maps indicating areas likely to be inundated under projected future sea-level rise. Council must decide whether to include these maps in their planning scheme and restrict development in areas designated as being subject to sea-level rise risk.

What is the decision-maker's power/authority?

The *Fictional Government Act* provides that the local government has the power to do anything that is necessary or convenient for the good rule and local government of its local government area.

Is there factual certainty?

The hazard map data have been gathered at a large scale and are not necessarily completely accurate at a finer scale.

Council investigates the possibility of obtaining property-scale data for all properties included in the hazard maps, but the cost is prohibitive.

Is there legal certainty?

Council seeks advice from its in-house lawyer, who advises that Council should not incur negligence liability in relation to the development of a planning scheme itself, but may incur liability for development decisions that are made which fail to take account of climate change impacts.

Further, the lawyer advises Council that providing a blanket restriction on development in hazard zones may assist Council in defending any challenges to individual development application refusals, as the refusal is consistent with government policy.

The lawyer suggests that Council obtain appropriately drafted disclaimers to accompany the hazard mapping and allow property owners to engage experts to undertake property-scale mapping, which can override the government maps.

Outcome

Council's new planning scheme prohibits new development in mapped coastal hazard areas, unless a property owner can produce evidence from an appropriately qualified expert demonstrating that there is no sea-level rise risk.

Scenario 2: Assessing a development application for a large mixed-use coastal development

What is the action/decision to be made?

Fictional Bay Council must decide whether to approve a development application for a large mixed-use coastal development.

Background

The subject land directly fronts a coastal shoreline.

Council has received a development application for a large mixed-use development on the subject land, which lies within its local government area.

The development application includes an Environmental Impact Assessment Report ('the Report').

The Report contains a section on sustainability, which notes that the subject land is susceptible to erosion and inundation as a consequence of current projections for sea-level rise.

The Report advises that the development will be protected from the coastal hazard impacts by measures such as dune enhancement, boundary-level enhancement or rock walls.

What is the decision-maker's power/authority?

Council has powers and responsibilities to assess the proposed development application.

Is there factual certainty?

Council does not have up-to-date coastal hazard modelling for the subject land but does have access to broad scale mapping provided by the state government. The state mapping indicates that approximately one-third of the subject land will be prone to coastal hazard impacts. The state mapping, however, contains a disclaimer indicating that it is not sufficiently accurate to the scale Council requires to assess the development application.

The Report provided by the applicant is based on more recent modelling than the Council's. It states that only a small portion of the subject land will be affected by coastal hazards arising from projected sea-level rise, and that the proposed protection measures will be sufficient.

Council commissions a duly qualified and experienced climate change consultant to review the Report, who concludes that the information in the Report is correct and accurate under current projections.

Is there legal certainty?

The *Fictional State Planning Act* provides that a development application may be made to a council for approval to carry out development, and that the application must describe the development and contain any other material required by the council. The Act states that when an application for development that may be affected by natural hazard impacts is made to a council for approval, it must be supported by an environmental assessment.

The Act requires the council to take into account climate change when assessing an application for development, specifically accounting for the potential adverse impacts of climate change on development and seeking to address the impacts through ecological sustainability.

Having taken into account the law, Council's solicitor advises that Council is able to accept the proponent's report. In taking the advice of its legal advisers into account, Council is of the view that there is sufficient legal certainty that, if it approves the development application based on the material it has before it, the risk of a review of its decision will be minimal, and in any event the decision will be defensible in court.

Outcome

In light of the above, Council decides that it will consent to the development application and issue a permit on the following basis:

- (a) Council has the powers necessary to approve development of the type proposed on the subject land.
- (b) There is sufficient factual certainty in terms of the coastal hazard impacts under current projections and the efficacy of the measures proposed to protect the development from those impacts.
- (c) There is sufficient legal certainty in terms of the matters that Council must take into account when assessing development affected by natural hazard impacts and the procedures that must be followed in order for Council to be exempt from liability for its decision.

Scenario 3: Assessing a development application for 100 residential lots

What is the action/decision to be made?

Fictional Bay Council must decide whether to approve a development application for 100 residential lots.

Background

An application has been made for land directly fronting a coastal shoreline. The proponent intends to develop 100 residential lots and sell them.

What is the decision-maker's power/authority?

Council has powers and responsibilities to assess the proposed development application.

Council must also have regard to any advice received from the state's Coast Bureau.

Is there factual certainty?

Council does not have up-to-date coastal hazard modelling for the subject land, but does have access to broadscale mapping provided by the state government. The state mapping indicates that approximately one-third of the subject land will be prone to coastal hazard impacts.

The Coast Bureau provides a report to Council stating that the subject land is subject to a high risk of inundation and recommending against approval of the development.

Is there legal certainty?

Council is not legislatively required to follow the Coast Bureau's advice, but it must 'have regard to' it. Council seeks advice from its in-house lawyer, who advises that approving the development may result in potential future negligence liability for Council from landholders, given that Council was in possession of information concerning the risk.

Outcome

In light of the legal advice received, Council refuses the development.

Scenario 4: Council provision of infrastructure – upgrade of stormwater

What is the action/decision to be made?

Fictional Bay Council is considering upgrading stormwater infrastructure to the Downhill Estate.

Background

Council has obtained advice from its climate change consultant that climate change modelling has identified projected increases in the frequency and intensity of rainfall in the region.

Council has also commissioned an assessment of its stormwater infrastructure system. The assessing engineer's report concludes that in the event of rainfall occurring to the extent projected by the climate change modelling, the existing stormwater system does not have sufficient capacity to convey the excess stormwater and discharge it safely away from the Downhill Estate. The report concludes that unless the stormwater system is upgraded, it will likely fail during one of the projected events and would result in temporary flooding in the Downhill Estate. According to the report, the resultant flooding is likely to cause significant damage to property.

A group of concerned citizens from the Downhill Estate obtains a copy of the assessing engineer's report and demands the Council immediately upgrade the remaining infrastructure.

What is the decision-maker's power/authority?

The *Fictional Government Act* provides that the local government has the power to do anything that is necessary or convenient for the good rule and local government of its local government area.

Is there factual certainty?

Council determines that it does not have sufficient information to confirm that the existing stormwater infrastructure is inadequate. It consults further with the engineer and climate consultant who completed the initial reports.

The assessing engineer confirms that the existing infrastructure has reached close to its maximum capacity. Any increase in the quantity of stormwater will cause the system to fail and result in some degree of flooding. The assessing engineer's report appears unequivocal that the stormwater infrastructure system cannot handle an increase in load.

The climate change consultant's advice is not specific as to the locations, frequency and intensity of the projected rainfall. Council therefore requests further advice from the climate change consultant.

The climate change consultant confirms that the modelling provides sufficiently accurate projections on a region-wide basis but is not specific to the area in which the Downhill Estate is located, nor indeed to the local government area itself. The consultant further confirms that it is uncertain as to the extent of the increase in intensity or frequency of rainfall, only that there is sufficient certainty that it will increase 'substantially' above current levels.

Council enquires as to whether further modelling can provide greater certainty in respect to the increase in quantity, frequency and locations of the rainfall. The climate change consultant advises that the increases in the levels of accuracy being sought are not achievable.

Therefore, the projected risk cannot be determined with complete factual certainty.

Is there legal certainty?

Council must ascertain whether it has legal obligations in respect of the management and operation of the infrastructure.

Council's solicitor advises that the *Fictional Government Act* states that it is the responsibility of Council:

- (1) to protect people and property by ensuring that stormwater services, infrastructure and planning are provided so as to minimise the risk of urban flooding due to stormwater flows

- (2) to provide for the safe, environmentally responsible, efficient and sustainable provision of stormwater services.

The Act also states that Council must provide for such public stormwater systems as may be necessary to effectively drain the urban area of Council's municipal area.

Further, the Act states that, except as otherwise provided for in the Act, Council must keep the public stormwater systems it owns and operates in good working order.

Council's solicitor also advises that there have been three recent Fictional Court decisions that are relevant to the matter.

The first court case involved a council that, although having received advice about the impacts of climate change, had not upgraded its stormwater infrastructure; as a consequence, during a major storm event widespread flooding had caused loss and damage to property. The council in that case had been found negligent in the sense that it breached its duty of care to the landholders within its local government area who suffered from the flooding.

The second court case involved a claim against a council for having rezoned land to avoid further residential development because the land was located in a flood plain that, as a consequence of projected climate change impacts, was expected to be prone to increased flooding. The landholders had sought compensation for the loss in value of the land. The court had determined that property development was inherently a risky business, and that the council could not be held responsible for the risk.

The third court case involved an application to develop land above the planning scheme-defined flood level, but evidence suggested that further development would be prone to flooding as a consequence of projected impacts from climate change. The court applied the precautionary principle (see Appendix) and determined that until there was sufficient certainty in the modelling to demonstrate future development would not flood, the application should be refused.

Outcome

In light of the above, Council decided that it must proceed with carrying out the upgrade to the infrastructure on the following basis:

- (1) Council has a legal responsibility to ensure the stormwater infrastructure is capable of dealing with the increased rainfall.
- (2) Council has a legal responsibility to ensure that damage or loss does not occur to properties as a result of increased rainfall causing the stormwater infrastructure to fail.
- (3) Although it was uncertain as to the intensity or frequency of the projected rainfall, Council should apply the precautionary principle and assume that the rainfall would be substantial enough to exceed the capacity of the existing stormwater infrastructure.
- (4) While it was possible that the court would not find Council solely responsible for the fact of the Downhill Estate flooding, if the flooding occurred as a result of the stormwater infrastructure failing – having been aware of the projected increases in rainfall and the limitations of the stormwater infrastructure – Council could be found negligent and therefore civilly liable if flooding occurred and it resulted in damage to property.

Scenario 5: Provision of infrastructure – stormwater upgrade and community concerns

What is the action/decision to be made?

A group of concerned citizens has demanded that Council upgrade their stormwater infrastructure.

Background

A group of concerned citizens has obtained an engineer's report that suggests that, in the event of rainfall occurring to the extent projected by the climate change modelling, the existing stormwater system does not have sufficient capacity to convey the excess stormwater and discharge it safely away from the Downhill Estate. The report concludes that unless the stormwater system is upgraded, it will likely fail during one of the projected events and would result in temporary flooding in the Downhill Estate. According to the report, the resultant flooding is likely to cause significant damage to property.

The group gives this report to Council. However, Council's budget is extremely limited, and there is not enough money currently allocated to stormwater maintenance to cover the costs of the upgrades.

What is the decision-maker's power/authority?

The *Fictional Government Act* provides that the local government has the power to do anything that is necessary or convenient for the good rule and local government of its local government area.

Is there factual certainty?

Council asks its in-house engineer to assess the report provided by the citizen group. The in-house engineer advises that further information would be needed to ascertain whether there is in fact a risk.

Is there legal certainty?

The *Fictional Government Act* is silent as to whether Council is obliged to upgrade stormwater infrastructure.

Council seeks advice from its in-house lawyer, who advises that the law as it applies to negligence is uncertain in this area, although the *Civil Liability Act* does suggest that general allocations of resources will not be open to challenge.

As Council has genuinely allocated budget resources elsewhere, an action in negligence in the short term is unlikely to succeed. However, Council's lawyer recommends that Council consider integrating stormwater upgrades into their future budget.

Also, Council's lawyer indicates that a nuisance action could be possible if the stormwater infrastructure fails and causes property damage. This also supports the need for a planned upgrade.

Outcome

Council includes an allocation in its next financial year budget for obtaining detailed engineering studies on the capabilities of the stormwater infrastructure under climate change.

It also updates its 10-year budget forecast to include funds for possible stormwater infrastructure upgrades, depending on the findings of the engineering study.

It also seeks legal advice as to the possibility of imposing an extra levy on rates to cover the upgrade.

Scenario 6: Provision of protective infrastructure (seawall)

What is the action/decision to be made?

A group of coastal landholders has asked Council to construct a seawall to protect their properties.

Background

The state government has released hazard mapping indicating areas likely to be inundated under sea-level rise. A group of concerned citizens has approached Council, as their properties are zoned as having a sea-level rise risk. They have requested that Council construct a seawall to protect their properties.

What is the decision-maker's power/authority?

The *Fictional Government Act* provides that the local government has the power to do anything that is necessary or convenient for the good rule and local government of its local government area.

Is there factual certainty?

Council seeks advice from its in-house engineer, who confirms that the properties are likely to be affected by sea-level rise. The engineer also advises Council that a seawall may protect those properties, but may also exacerbate erosion for properties located further along the coast. It is also in an area of high wave energy, and the seawall will therefore need expensive ongoing maintenance.

Is there legal certainty?

Council seeks advice from its in-house lawyer, who advises that Council does not have an obligation to construct a seawall. However, it will have an ongoing obligation to maintain a seawall if one is constructed.

The lawyer also advises that Council may be the subject of legal proceedings in negligence or nuisance from the neighbouring landholders if erosion is exacerbated and damages their properties.

Outcome

Council declines to construct a seawall.

Council advises the property owners that they may apply for development approval to construct the seawall at their own cost, but that they will need to prove that the seawall will not impact on neighbouring landholders. The property owners will also be subject to ongoing management obligations.

Council also decides to adopt a strategy for future seawall development, and include it in its planning scheme.

Scenario 7: Development approval for protective infrastructure (community-built seawall)

What is the action/decision to be made?

A group of coastal landholders has asked Council for development consent to construct a seawall to protect their properties.

Background

The state government has released hazard mapping indicating areas likely to be inundated under sea-level rise. A group of concerned citizens has approached Council, as their properties are zoned as having a sea-level rise risk. They have requested development approval to construct a seawall to protect their properties.

What is the decision-maker's power/authority?

Council has powers and responsibilities to assess the proposed development application.

Is there factual certainty?

Council seeks advice from its in-house engineer, who confirms that the properties are likely to be affected by sea-level rise. The engineer also advises Council that the proposed seawall is unlikely to exacerbate erosion for properties located further along the coast. It will, however, need expensive ongoing maintenance.

Is there legal certainty?

Council seeks advice from its in-house lawyer, who advises that the *Fictional State Coastal Act* directs that a development approval for coastal protection works must not be granted unless satisfactory arrangements have been made for maintenance of the works and any necessary beach restoration. These arrangements must be imposed as conditions on the development consent and must bind the current owner and any future owners.

The lawyer also advises that covenants must be registered on land title with details of these obligations.

Outcome

Council decides to request that the landholders obtain engineering studies in order to formulate a detailed plan for maintenance and repair of the seawall.

Council indicates that it will approve the development subject to a satisfactory plan for maintenance and registration of these arrangements on title.

3 Conclusion

Coastal decision-makers are in an undeniably difficult situation. Decisions have to be made in circumstances where there is high uncertainty surrounding the facts and the law, and some classes of decision may attract legal challenge regardless of which course of action is chosen. The purpose of this manual is to give some preliminary information on the types of legal risk that may arise and potential ways for government to deal with these legal risks.

This manual is also intended to encourage decision-makers to turn their minds to these tricky issues at an early stage and seek advice. Uncertainty should not be used to defer making difficult decisions about climate change adaptation. Governments should work towards strategic planning for future development and incorporate adaptation planning into their budgets. Courts do not expect a standard of perfection from governments, particularly in situations where resources are scarce, but they will view proactive planning favourably.

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Appendix: Definition of terms

Climate change adaptation from a legal perspective

i. What is 'climate change adaptation'?

The Intergovernmental Panel on Climate Change (IPCC), in its fifth assessment report (IPCC, 2013), defines adaptation as:

The process of adjustment to actual or expected climate and its effects. In human systems, adaptation seeks to moderate or avoid harm or exploit beneficial opportunities. In some natural systems, human intervention may facilitate adjustment to expected climate and its effects.

In this manual, we consider the goal in undertaking adaptation is to minimise legal risk for decision-makers in any action they may take to avoid the adverse impacts of climate change.

Climate change adaptation for local government seeks to provide a process specifically designed to minimise harm to local communities and ecosystems from adverse consequences of climate change. Climate change adaptation for local government can therefore refer to actions by that local government to drive or assist in the adjustment of communities and natural systems to deal with negative climatic influences.

As well as focusing on protection from harm, climate change adaptation may also include taking advantage of opportunities that adaptation can bring.

ii. What is a 'risk'?

Risk is typically measured as a product of probability and seriousness of consequences. In the broadest sense, risk is the effect of uncertainty on achieving the decision-maker's objective, combined with the potential consequences if those objectives are not met (based on Australian/New Zealand Standard ISO 31000:2009 – Risk Management – Principles and Guidelines definition). This means that, where we expect an outcome and some element of uncertainty is introduced, the risk is that the outcome will not be what was expected. At the same time, the outcomes may have

negative impacts socially, environmentally or economically, to a person or their property.

Objectives can have different aspects. A local government may have financial or environmental objectives, or it may have a range of other objectives.

Objectives can also apply at different levels. They may apply at a strategic level, an organisation-wide level, a project level or even a process level.

As an example, a water supplier's objective might be to improve environmental management in a catchment area so as to ensure a certain level of water quality and thereby reduce treatment costs. If there is uncertainty as to how increases in the intensity and frequency of rainfall might affect run-off and therefore water quality, we can see that there is a risk that the desired costs savings may not be achieved.

iii. What is different about legal risk?

Rather than looking at the probability of objectives not being fulfilled and the consequences of that, legal risk is instead concerned with who bears the risk. We tend to consider legal risk in terms of avoidance, transfer or minimisation.

Should a legal risk be realised, there is the potential for loss arising from having to defend legal proceedings. Equally, there may be uncertainties as to outcomes, which could include penalties, compensation requirements, private settlements or costs orders.

A typical example of a legal risk is the risk of failing to comply with regulatory requirements; the consequence of this may be a review of the decision by the courts.

However, when seeking to manage legal risk, it is necessary to consider any legal uncertainty (e.g. how the law might apply) and the certainty or uncertainty of the factual elements (e.g. what has actually occurred).

Factual uncertainty may be a question of whether the facts exist or whether the right set of facts exists.

Legal uncertainty – the application of decision-makers' obligations and duties – depends on an interpretation of the law and is a legal issue.

In any single decision, there may be uncertainty as to the facts, as to the law or as to both.

As such, we can seek to minimise or avoid the legal risk by reducing the uncertainty. This may be achieved by adjusting the objectives set by the decision-maker or obtaining further information or legal advice.

At this stage, it is useful to consider an example:

A council seeks to determine the risk of exposure to an action in negligence for a breach of its statutory duties where development is to be approved in an area that is highly prone to natural hazard impacts, such as bushfire.

Under the law, the council could be liable if it is determined that there has been a breach of a statutory duty that resulted in damage to the property developed.

There may not be complete certainty in respect of a number of matters the council will need to take into account. For example, in terms of factual certainty: What are the factual circumstances that could trigger the application of the duty? What is the extent of any existing information that the council could or should rely on in making its decision to approve the development? What measures are in place to ensure the council's officers or employees understand, or will even comply with, the duty?

Consideration must then be given to the legal uncertainty. In the case of a new or unproven action, say under a climate change scenario, there may be considerable variance in how the courts will decide the matter.

Risk, by its very nature, includes an element of uncertainty. Legal risk is tied closely to planning, because risk itself is a concept that we use in order to plan, to evaluate and to manage expectations about future uncertainty.

iv. What is 'climate legal risk'?

Climate legal risk is the risk of exposure to legal action that accompanies a decision that relates to climate change impacts.

It encompasses the above elements of factual and legal uncertainty and specifically concerns the risk arising from legal duties and obligations as they relate to the impacts of climate change.

v. Why is climate legal risk relevant to coastal decision-makers?

Coastal decision-makers are potentially more vulnerable to climate legal risk. If there is a continuation of current development patterns, which tend to increase coastal development, and at the same time there is a risk of climate change impacts events, particularly from a coincidence of events such as riverine flooding and coastal storm surge, then impacts of the events on the local community may increase.

It is therefore crucial that coastal decision-makers are equipped with the necessary skills to understand and confront these risks. Importantly, decision-makers need to be equipped with the ability to identify and minimise their climate legal risk by knowing the extent of their powers and duties and knowing that the decisions and actions they have taken are reasonable in the circumstances.

Key terms and principles

It is useful for decision-makers to understand two of the key terms and guiding principles of climate change law. These terms are used widely in legal instruments and policy documents that deal with climate change. Understanding them will assist in the process used to identify climate legal risk.

i. Ecologically Sustainable Development

Ecologically sustainable development (ESD) is seen as development that aims to balance the needs of present and future generations. This balance (not trade-off) includes the protection of ecological processes, economic development and the preservation of cultural and social wellbeing.

The principle of ESD holds that decision-makers should seek to integrate these factors in any given decision to reach sustainable methods of development.

ii. The Precautionary Principle

The precautionary principle is the key tenant of ESD. It recognises that if there is risk that an action will cause harm, in the absence of scientific certainty the burden of demonstrating that no harm will occur falls with the person taking the action.

The principle encourages a precautionary approach when there is a lack of full scientific certainty. It seeks to promote proactive, rather than reactive, behaviour by decision-makers in addressing possible degradation to the environment.

It is currently one of the leading principles of Australian environmental law and has been adopted in a number of court decisions.

Heads of powers

In order for a decision to be defensible, it must be made within the limits of the decision-maker's powers. The decision-maker must identify the source of their powers and understand the limits on that source. This will include whether or not utilisation of the power is discretionary or mandatory and whether the decision-maker has the authority to delegate decisions, the extent of the delegation and whether they are still ultimately responsible for the decision despite delegation.

A local government decision-maker will likely find that the majority of their powers originate from a single Act of Parliament that provides a legal framework for a system of local government and regulates the relationship between the people and the government. This Act is often referred to as the Local Government Act. The exercise of these powers will be further particularised in a wide range of state and local legislation. Depending on the issue and the powers being exercised, the decision-maker may need to trace their powers through a number of Acts and statutory instruments.

The Acts will impose a range of powers, responsibilities and functions on the local government's decisions, some of which may be construed by the courts as duties and some of which may be affected by climate change. For

example, an Act may require local government decisions to have regard to the principles of ESD in carrying out their responsibilities or, even more explicitly, to take into account climate change when making land-use planning decisions. Alternatively, these considerations may be discretionary, and it will depend on the language of the relevant Act.

The following provides some examples of the type of sources that may have a bearing on a climate change-related decision. Sometimes, decision-makers may be expected to consider these instruments in arriving at their decision. With regards to international climate change law, this is an area where some legal uncertainty may arise. The extent of consideration will depend on whether the treaties, conventions and instruments are either incorporated into national and local law or the position of the court as to the degree to which it will need to be considered.

i. International climate change law

(A) UN Framework Convention on Climate Change

The United Nations Framework Convention on Climate Change (UNFCCC) is an international treaty initiated in 1992. The Framework is binding on the 195 countries currently party to the agreement; however, it does not contain enforceable obligations.

Central to the Convention is the annual Conference of the Parties (COP), which seeks to establish measures for limiting global temperature increases and the impacts of climate change.

(B) Kyoto Protocol

The Kyoto Protocol is an international treaty arising from the 1992 UNFCCC. It sets legally binding emissions reduction targets for developed nations under the principle of 'common but differentiated responsibilities'.

The Protocol is currently in its second stage of commitment, which involves an 18% reduction in greenhouse gas (GHG) emissions below 1990 levels by 2020.

Australia is one of 192 parties to the Protocol.

(C) The Copenhagen Accord

The Copenhagen Accord is one of the primary outcomes of the 2009 United Nations Climate Change Conference. It is a two-page document verified by 26 Heads of State providing voluntary climate change commitments for each party.

The Accord points to a need for GHG emissions to remain low enough to ensure the global average temperature stays below 2 °C and for all countries to undertake appropriate adaptation measures.

The Accord further provides that developed nations hold a responsibility to assist their developing neighbours in identifying and implementing adaptation strategies.

(D) The Paris Agreement

The Paris Agreement is an international accord between 187 countries to limit temperature rise to below 2 °C and to actively strive to limit temperature rise to 1.5 °C. The Agreement was reached at the 21st United Nations COP in December 2015 and is the first global climate change deal of its kind.

Key to the Agreement is the mandate for all countries to set national targets for reducing GHGs, commencing in 2020 and reviewable every five years. Wealthier countries are also obliged to continue the provision of financial support to more vulnerable nations, pledging to raise \$100 billion per year by 2020 to assist poorer countries transition away from fossil fuel-driven economies.

While the Agreement does not command specific emissions targets for each country, it does create a framework for regular review of targets based on principles of transparency. Specifically, countries are required to report their emissions reductions at review intervals.

With the acknowledgement of greater crossovers between disaster risk reduction and climate change, it may also be relevant to take into account in some cases additional international instruments such as the Sendai Framework for Disaster Risk Reduction 2015–2030. This is a major agreement and recognises that addressing climate change is one of the drivers of disaster risk.

ii. Australian climate change law**(A) Legislation**

Legislation refers to Acts of Parliament that are codified (or arranged) in a legally binding form.

There is currently no Australian legislation solely devoted to climate change adaptation. Rather, climate change has been considered in relation to broader environmental doctrines, such as ESD and the precautionary principle, often under planning and environmental legislation.

(B) Case law

Case law refers to decisions that are reached by courts and tribunals. Australia is a common law (or case law) country, which means these decisions can be significantly influential on future cases and, ultimately, decision-makers.

In this manual we have not provided a summary (or case notes) on the various Australian court decisions that deal with climate change because the University of Melbourne Law School has already compiled and maintains a comprehensive database of these decisions along with summaries of the cases. The database can be found at <http://alla.law.unimelb.edu.au/creel/research/climate-change-litigation-database/climate-change>.

iii. Climate change policies

As previously mentioned, policies hold less weight than legislation and case law, but they are nevertheless still important instruments for decision-makers to consider.

Information/education-based instruments (internal guidelines) provide government and industry with informal instruments to affect responses to climate change. They are often compiled by experts in the area and seek to deliver a strategic approach to climate policy. This manual is an example of an information-based instrument.



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