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LAWYERS



Climate change and risk for the South-West

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FILE NUMBER



Agenda

- Likely impacts of climate change on Australia and the South West
- Key risks
 - Litigation risk
 - Barriers in current legislative and policy frameworks
 - Physical and operational risk
 - Regulatory risk
 - Supply chain risk
 - Reputation risk
 - Missed opportunity risk
- Responding to climate change risk



Overview of likely impacts of climate change on Australia

- According to BOM and CSIRO:
 - average temperatures are projected to rise;
 - decreases in rainfall are likely in the decades to come in southern areas of Australia during winter, in southern and eastern areas during spring, and in south-west Western Australia during autumn;
 - the frequency and duration of extreme events such as heavy rains, cyclones, floods, and droughts is likely to increase; and
 - sea level is likely to rise of between 9 to 88 cm by 2100 compared to 1990.



Overview of likely impacts of climate change on the South West

- Climate change is also expected to generate an increase in the frequency and intensity of storms, which can result in: temporary sea levels surges, low-lying coastal area flooding, narrowing of beaches and coastal erosion.
- A recent natural hazards risk study to the Perth region identified coast between Bunbury and Mandurah as most vulnerable to coastal erosion from sea-level rise.
- Over 80% of the State's population currently lives within 30 kilometres of the coast.



Litigation risk

- Rising sea-levels and storm damage on our coastline will have serious implications for home owners, tourism, coastal infrastructure and coastal industries
- As the risks for coastal property owners become more pronounced, availability of insurance for these vulnerable property owners may be restricted
- Property owners may pursue the decision makers who gave planning approval for development on coastal property and exposed these property owners to the risk of damage caused by rising sea-levels and storms



Current approach to litigation

- Decisions of local councils to approve development in coastal areas without adequate consideration of climate change risks have been targeted through existing planning judicial review mechanisms.
- This has resulted in several development approvals in coastal areas being overturned.



Potential future shift in litigation

- As we see more damage sustained by coastal property owners in the future, there may be a movement toward recovering damages from planning and development authorities who have exposed coastal property owners to such damage.



Cause of action

- Negligence is a failure to exercise care and skill. In an action for negligence, the plaintiff must prove that:
 - the defendant owed him or her a duty to take reasonable care;
 - the defendant breached that duty by failing to take reasonable care;
 - the defendant's breach of duty caused the injury or damage suffered by the plaintiff; and
 - the injury or damage suffered was not too remote a consequence of the breach of duty.

Source: Halsbury's Laws of Australia, accessed via LexisNexis



Duty of care

- The High Court in recent decisions suggests that a duty of care will arise if the following criteria are satisfied:
 - **Statutory powers**
 - **Proximity**
 - **Control**
 - **Knowledge**
 - **Vulnerability**
 - **Reasonableness**



Duty of care

- Can developers/local councils reasonably foresee that their conduct may be likely to cause loss or damage?
- Science is very clear on impacts of climate change, including projected sea-level rise:
 - Domestically – major CSIRO report: *Climate Change in Australia* (2007)
 - Internationally – Intergovernmental Panel on Climate Change: *Fourth Assessment Report: Climate Change 2007*



Breach

- Once a duty of care is established, it is necessary to determine whether that duty has been breached.
- If the answer is yes, the court must then determine what a reasonable person would do by way of response to the risk.



Statutory defence

- However, if the decision of the public body is a policy decision within the meaning of 5U of the *Civil Liability Act 2002* (WA) then it cannot be used to support a finding that the defendant was at fault unless the decision was so unreasonable that no reasonable public body or officer in the defendant's position would have made it (5X CLA).



Causation and remoteness

- Potential plaintiff or class of plaintiffs need to suffer injury or damage as a result of the council or developer's breach of a duty of care
- This question of specific causation is perhaps the area of most uncertainty for potential litigants.



Causation and remoteness

- A plaintiff would need to demonstrate that, on the balance of probabilities, the council or developer's breach of duty caused or materially contributed to their injury or damage suffered; and
- The injury or damage suffered was not too remote a consequence of the breach of duty



Remoteness

- When determining the question of remoteness courts will consider, among other things, why responsibility for the harm should, or should not, be imposed on the defendant



Statutory defence for obvious risks

- Local Governments will not be liable for obvious risks or for the materialisation of inherit risks which the plaintiff must be taken to have accepted (5N and 5P *Civil Liability Act 2002* (WA))
- This raises the question of when the risk of coastal damage as a result of climate change became or will become obvious within the meaning of s5E CLA?



Managing litigation risks

- One practice adopted by local governments is to require proponents, by way of a development condition, to enter into a deed of indemnity indemnifying the local government from damage or loss arising from the effects of flooding
- Another practice has been to require an independent certification from the proponent that the proposed development is adequate having regard to climate change affected flood risk



Managing litigation risks

- Section 733 of the *Local Government Act 1993* (NSW) provides comprehensive statutory immunity for local governments in relation to advice given or anything done or omitted to be done (including the granting of development approval and carrying out of flood mitigation works), in relation to flood liable land or land within the coastal zone (733(1)) and exempts council for advice, action or inaction relating to coastal hazards for decisions taken in good faith



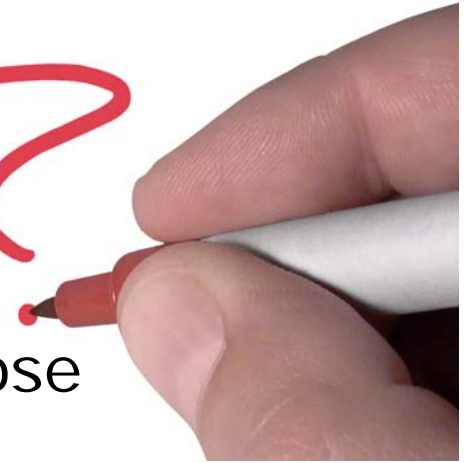
Managing litigation risks

- Local governments must ensure that their local planning schemes are up to date with the latest scientific knowledge and predictions and ensure they act reasonably in implementing all available measures which will reduce the risk of damage
- In showing reasonable consideration and action when carrying out their statutory duties in relation to the risks associated with changing coastal conditions, councils are more likely to satisfy their duty of care in relation to coastal landholders and avoid liability



Barriers in current legislative and policy frameworks

- Current legislation and policies may pose challenges to companies in seeking to address climate change in their particular business space
- Uncertainty surrounding policy direction also creates a barrier to climate change related action and investment



Physical and operational risk

- Companies need to be aware of the possible physical and operational risks climate change may pose in respect to assets and infrastructure



Regulatory risk



- Companies need to manage the risks of regulatory sanctions by staying aware of their present and future legal liability under climate change laws
- Companies also need to understand, and allocate, the risks of changes in law, particularly in long-term contracts



Regulatory risk continued

- The *National Greenhouse and Energy Reporting Act 2007* (Cth) established a mandatory corporate reporting and compliance system for information related to greenhouse gas emissions, greenhouse gas projects, energy production and energy consumption
- **Does your business understand its reporting obligations and the flow-on impacts to contracts with counterparties such as subcontractors?**



Supply chain risk

- Companies need to understand how the projected upstream costs impacts of a future price on carbon will affect their supply chain, and plan and manage their budgets accordingly



Reputation risk

- Companies seeking to portray a green image need to be careful to ensure that their claims can be substantiated and will withstand the scrutiny of regulators and the community



Missed opportunity risk

- Some climate change policy reforms may represent opportunities for companies



Responding to risk

- Requires both mitigation and adaptation - we need to address both climate change cause and effects
- Mitigation - reduce greenhouse gas emissions to help lessen rate and overall magnitude of climate change
- Adaptation - need to learn to live with a changing climate



Mitigation

- Whole of economy approach required
- Government, business and the community can and should be looking for ways to improve energy efficiency and reduce greenhouse gas emissions
- Key domestic and international mitigation tool is likely to be a price on carbon – to drive emissions reduction at least cost



Adaptation

- Climate change adaptation also needs to be considered by all levels of government, business and the community
- Do policy and investment decisions you are making today take into account likely impacts of climate change predicted by best available science of the day?
 - NSW Parliament is currently considering a coastal protection bill to give landholders rights to protect property from rising sea levels, allow emergency works and create a new state government consent authority to cover long-term protection works



Key message

Despite policy and legislative lag at a global and national level

You can and should be taking action to address climate change related risks right now



ANY QUESTIONS?



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LAWYERS

