

Coastal Workshop

27 November 2013

Councillors' responsibilities and obligations in
addressing and planning for climate risks



Overview

1. Climate Change: Implications for Councils
 - a. Key predicted impacts of climate change
 - b. Implications for Councils
 - c. Legal Risks
2. What's New?
3. Recommendations

Key Predicted Impacts of Climate Change

The key predicted impacts of climate change include:

- * Increased severity of storm, rainfall, high temperature events;
- * Increased frequency of weather events (e.g., 1 in 100 year flood event may occur every 1 in 10 years, or annually);
- * Sea level rise;
- * Increased likelihood of confluence events: e.g., King tide occurring simultaneously with storm cyclone or high rainfall event

There is increased uncertainty regarding the timing, frequency and severity of these impacts.

Implications for Councils

I. Asset Management

- * Different construction standards for buildings, roads, footpaths, drainage systems
- * Requirement for new infrastructure: sea walls/levees, stormwater drainage systems
- * Balancing protection of private assets/public spaces
- * New levies/reallocating spending priorities

Implications for Councils (cont.)

II. Planning for Development

- * Developing retreat/adaption strategies
- * Approving/rejecting development applications in potentially affected areas
- * Initiating or supporting proposed zoning changes

Implications for Councils (cont.)

III. Obtaining/reviewing and communicating information

- * Ensuring information on CC issues & legal responsibilities is current, accurate and relevant (e.g., SLR benchmark, time of significant policy change)
- * Revising Bushfire Risk, Flood Management and other plans
- * Communicating CC issues and risks to affected parties

Legal Risks

- I. Decisions made or not made may be challenged in Court and/or require payment of compensation. Litigation is always expensive and time consuming.
 - a. **Planning/administrative law: Challenge if decision not made lawfully. Decision may be remade or remitted.**
 - * E.g. *Minister for Planning v Walker* (2008) 161 LGERA 423; [2008] NSWCA 224 and *Aldous v Greater Taree City Council* [2009] NSWLEC 17 (19 February 2009): Implied requirement to take CC into account as part of “public interest” criteria – effect of White Paper reforms?

Legal Risks (cont.)

- b. Tort: Compensation claim in negligence, breach of statutory duty or nuisance**
 - * **Negligence:** Effectively require “manifest unreasonableness” (more likely as scientific evidence mounts)
 - * **Example 1:** DA granted but development becomes uninhabitable due to CC, or development causes consequential damage to other structures (e.g. sea wall), in circumstances where the risk of harm is foreseeable
 - * **Example 2:** Council infrastructure (e.g. stormwater systems, roads, seawalls/ levees) inadequately built/maintained causing property damage
 - * **Nuisance:** Likely to be growing area of litigation especially re: drainage systems or sea walls
 - * *Gales Holdings Pty Ltd v Tweed Shire Council* [2011] NSWSC 1128
- c. Statutory Compensation** - Required if land is acquired for a public purpose.

Legal Risks (cont.)

II. Section 733 indemnity

Indemnity from nuisance/negligence action, where Council:

- * in good faith;
- * provides advice, does anything, or omits to do anything;
- * which relates to either:
 - * the likelihood of land being subject to flooding, affected by a coastal hazard (if the land is in the coastal zone) or being subject to the risk of bushfire; or
 - * the nature and extent of any such affect or hazard

Council is assumed to have acted in good faith if there is compliance with a gazetted government guideline:

eg *Guidelines for preparing Coastal Zone Management Plans* – adopted under s733 in July 2013

III. Personal liability of Councillors/liability of Council

What's New?

a) Federal Government

Climate Adaption Outlook: Proposed National Adaption Assessment Framework

Reviewing mitigation targets: Climate Change Authority Draft Report recommends emissions reductions of 15% or 25% by 2020 rather than the proposed 5% target

b) NSW State Government

Stage 1: 2009 SLR Benchmark withdrawn, Planning circular re advising re CC risks in s149 withdrawn

Stage 2: Providing improved guidance (“in progress”)

c) International

Obama Executive Order

Recommendations

- * Make decisions/policy
- * Be informed
- * Support decisions made by Council staff (in accordance with policy)
- * Lobby & educate (work collectively)



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These slides have been produced solely to provide general assistance in relation to some aspects of climate change implications for coastal Councils. These slides are not exhaustive of issues which coastal councils may encounter, nor does it constitute legal advice. It is a general guide only and Councils must take care to fully consider the circumstances and laws applicable to their circumstances. While every care has been taken in the production of this document, no legal responsibility or liability is accepted, warranted or implied by the authors or by Beatty Legal Pty Ltd and any liability is hereby expressly disclaimed.