

Immunity from climate change liability: how can councils protect themselves?

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Despite the naysayers, climate change seems inevitable: the Intergovernmental Panel on Climate Change's 2013 report projected a sea-level rise of up to 0.98m by 2100.

Councils approving developments in locations susceptible to rising sea levels (or failing to warn of its risks when providing information about sites) are an obvious target to litigant asset owners who suffer an inundation attributable to climate change.

Drastically diminished asset values and economic losses from climate-related business interruption means future liability accruing to councils by litigated recoveries is potentially catastrophic.

Despite these risks, in November 2014 Queensland deputy premier Jeff Seeney formally directed that a Queensland council is not to include allowance for anticipated sea level change in planning instruments. Furthermore, there is presently no council

practice in Queensland to provide information on anticipated sea-level rises in council planning information services.

What can councils do to offset the risk of being sued for planning decisions or instruments that ignore the current state of scientific learning on future sea levels?

Insurance: Future liabilities can be offset by insuring against the risk of liability for council's negligence. However, where councils are already cognisant of climate change implications, care must be taken councils do not breach insurance policy requirements and the insured take reasonable precautions to prevent a loss. Availability of policy indemnity may be prejudiced where an insured entity has actual knowledge of a known risk and consciously or recklessly "courts the risk".

Apportion liability: A defendant council may avail itself of the proportionate liability regime in the *Civil Liability Act* if other wrongdoers

also contribute to the claimant's loss. Such wrongdoers could include providers of professional services engaged in the construction or transfer of the property.

Joinder: The permissible range of issues a council can consider in assessing development applications is subject to ministerial direction and legislative prescription by the state government. If sued, a council might seek indemnity or contribution by the joinder of governmental authorities that restrict council's capacity to consider climate change issues.

Change in law: Finally, relief may lie in future legislation. The current version of Queensland's Planning and Development Bill 2014 contains provision for an immunity for council's compliance with a ministerial direction for local planning instruments. However, it remains to be seen whether the Bill in its current form will be passed into law. ■

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