



New South Wales Property and Climate Change - Managing Risk in Transactions.

A Guide for Legal Professionals

Introduction

Australia is on the front line of climate change. Our communities and businesses have witnessed such extremes of flooding and bushfires in recent years and now is the time to take action and think ahead about what the future could bring. The warming climate is fundamentally changing our lives, communities and businesses. It has gone beyond being a fringe, scientific discussion to one that could become existential or overwhelm people's livelihoods.



As citizens, we need better, actionable information about where we live and for our property investment decisions, to better safeguard our futures. As legal professionals, you need to understand the scale of the risks that face property buyers and how to access better tools to help you advise clients. In the near future, this could become a significant Environmental, Social and Governance (ESG) and compliance issues for law firms.

Understanding the Scale of Climate Change

Direct economic losses resulting from natural disasters in 2022 around the globe are estimated at \$313 billion, with Australia hosting some of the costliest insurance industry events on record.

The El Nino and La Nina ocean current phenomena, has delivered increasingly severe swings in drought and flood events in alternating sequence. While Australia has suffered floods, Chile experienced near record temperatures. When the Australian bushfires of 2019-20 struck, Chile suffered flooding and landslides - so there is a clear relationship. 2023 signals a new stronger and warmer El Nino event that is driving record consecutive summer temperatures in Europe and is highly likely to lead to more extreme heat in Australia into 2024.



About 3.5 per cent of dwellings in Australia already fall under an international definition of being at "high risk" from climate damage.

The insurance industry is uniquely placed to understand how climate change is impacting lives and livelihoods across the country, with the McKell Institute forecasting that extreme weather event costs will reach \$35.24 billion each year by 2050.

Understanding the Scale of Climate Change *(continued)*

Whilst at present no region in Australia is uninsurable, 11% of Australians do not have insurance due to increased costs, sometimes with premiums outweighing the rebuild cost. Worsening extreme weather events are driving up premiums in parts of the country most exposed to extreme weather risk and rendering insurance unaffordable for some.

Since the Black Summer bushfires in 2019, the Insurance Council has declared 11 catastrophes and two Significant Events, and this has resulted in insurers recording more than \$13 billion in claims costs.

As climate change accelerates, Australia is set to experience more severe bushfires, hotter and longer heatwaves, rising sea levels that are exacerbating hazards along our coastlines, cyclones that are projected to intensify and possibly track further south, and an increase in rainfall intensity and associated flooding.



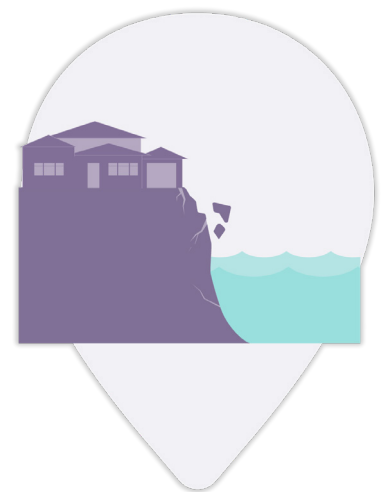
1,300,000

Of properties in NSW at moderate risk or higher of flooding*



927,000

Of properties in NSW at risk of bushfires*



13,400

Of properties in NSW at risk of coastal erosion*

Understanding the Impacts of Climate Change

"It is unequivocal that human influence has warmed the atmosphere, ocean & land. Human induced climate change is affecting many weather & climate extremes such as heatwaves, heavy rain, droughts & tropical cyclones; The impact of the change appears to be faster & more pronounced than previously anticipated."

IPCC — Intergovernmental Panel on Climate Change

Economic costs



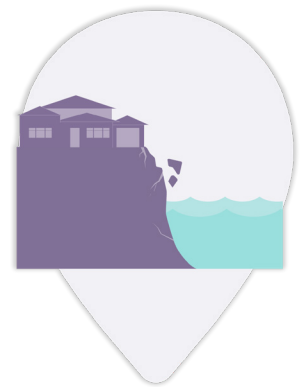
\$13 Billion

The amount paid out in climate related claims since 2019*



\$35.2 Billion

Annual extreme weather cost by 2050*



\$25 Billion

Property assets exposed to coastal risk*

The overall cost to Australia of not meeting the Paris Climate Agreement from now to 2050 is \$1.19 trillion* - due to infrastructure & property damage, agricultural & productivity losses, biodiversity loss and human health.

Understanding the Impacts of Climate Change *(continued)*

River Flooding



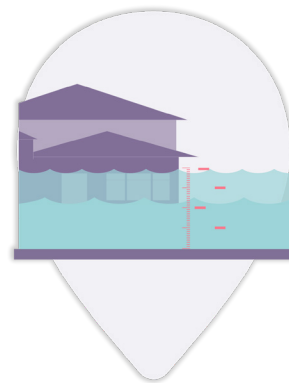
\$9.6 Billion

Total estimated cost of East Coast Flooding 2022*



240,000

The number of insurance claims submitted for flood damage events between January and October 2022*



14.4 Meters

The height of 2022 flood waters in Lismore CBD, NSW*

Flooding from rivers, estuaries and sea level rise poses the single greatest physical climate risk to properties in Australia. This is being driven by ever more frequent weather systems dumping record breaking rainfall amounts, especially across NSW and Queensland.

In 2022, Sydney received a staggering 8 months of rainfall in just 4 days, resulting in some 50,000 homes being evacuated. It became the 4th most costly weather event in history with an estimated insurance bill of some \$4.3 Billion. By 2050, the average cost to each property in flood prone areas could be as high as \$45,000.

This has inevitably meant huge increases in insurance premiums, with many areas close to rivers and coasts now finding effective and affordable cover impossible. This can also have the knock-on effect that securing the mortgage can become a real challenge.

Understanding the Impacts of Climate Change *(continued)*

Bushfires



\$1.2 Billion

The projected cost of bushfires per year over the next 30 years*



11 Million Hectares

The area of land burnt by the Black Summer bushfires*



\$73 Billion

The annual cost for 30 years to restore the native environment*

The Black Summer bushfires of 2019-2020 in eastern and south-eastern Australia were unprecedented in terms of their geographic location, spatial extent, severity and the forest types burnt. They were driven by extreme weather conditions including winter drought and high spring and summer temperatures, creating tinder-dry conditions.

While the above costs account for property and the native ecosystem restoration, the additional cost impacts to human health, loss of tourism and infrastructure could cost the Australian economy over \$100 billion.

The Blue Mountains have the most properties at risk, followed by the Central Coast, Sutherland Shire, Wollongong and Wollondilly.

It can cost upwards of \$100,000 to rebuild a 4 bedroom home, with an average of \$46,000 per house to remove debris, rising to \$68,000 if asbestos is found.

What does this mean for NSW real estate firms and conveyancers?

"Lawyers should be alive to the unfolding legal implications of climate change and its consequences, and they should be informed, skilled and ready to assist clients on climate change-related legal matters, within their areas of skill and competence."

Law Council of Australia - 2021

Accelerating climate change is becoming a major client concern. Homebuyers and business owners will need more guidance on the potential risks to avoid significant asset valuation impacts and ensure peace of mind.

But there is a key question: is it within the scope of a lawyer's/conveyancer's obligations to advise on the physical and transition risks of climate change?

Liability risks affect professionals who don't keep up with the times. What you need to do to discharge your duty of care is not frozen in time - the law always evolves and so does guidance to help them discharge it.

What was a reasonable standard of care or way of advising on this sort of topic 20 years ago, will not be the same standard that will be accepted or considered competent today. But what is the start point for this for NSW property lawyers and how does case law inform how guidance could evolve from its current position?

A View from the UK

"As the impacts of climate change reach further into more areas of society and the law, solicitors may be expected to guide and support clients as they navigate these challenges."

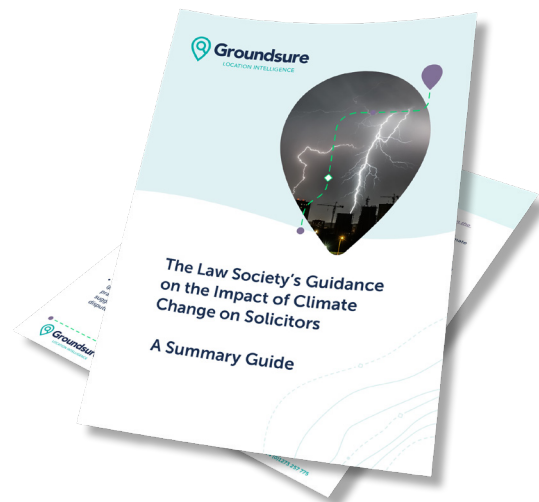
Law Society of England and Wales - 2023

What does this mean for NSW real estate firms and conveyancers?

The UK Law Society issued guidance to the legal community in April 2023. Building on their Climate Change Resolution of October 2021, it is detailed and wide ranging. It covers broad topics including business emissions, greenwashing and ethical considerations on dealing with clients that have a significant environmental impact (e.g. oil and carbon majors).

In its second and third parts, it moves on to consider how lawyers can advise their clients effectively about climate change and the specific duties that this advice falls under. A significant part of the guidance was in response to a formal legal opinion from Stephen Tromans KC, commissioned by Groundsure, that sought to answer the question about what firms can now do given there is better information available on climate impacts on property transactions.

Download a copy of the UK Law Society guidance Summary



Recent Case Law in Australia

Before we consider recent developments on legal opinion and the latest signals from the Lead Associations on climate risks for law firms, it is important to understand existing case law that could set a precedent for potential future claims in the absence of advice to clients.

Provident Capital Ltd v Papa [2013] NSWCA 36

This case concerns the failure of a solicitor to warn his client of the obvious financial risks associated with taking on a mortgage over her own home, in circumstances where her ability to repay the loan was entirely dependent on the success of her son's gymnasium business, a fact which was known to the solicitor.

Recent Case Law Australia (continued)



In this case, the NSW Court of Appeal found that the solicitor was negligent for failing to:

- Warn his client of the risks of the transaction; and
- Advise, in the strongest of terms, of the need to obtain independent financial advice.

In particular, the Court of Appeal stated:

“A solicitor’s obligation is not simply to explain the legal effect of documents but to advise his or her client of the obvious practical implications of the client’s entry into a transaction. The prospect of the subject transaction wreaking havoc on Mrs Papa’s life was glaring, given the by no means remote prospect that the business would be unable to support the loan repayments.”

PPK Willoughby Pty Ltd v Baird [2020] NSWSC 1757

“A solicitor can be found guilty of negligence/negligent mis-statement if they fail to complete proper searches during the course of undertaking due diligence in property transactions.

HWL Ebsworth, who acted for PPK Willoughby had been instructed not to obtain new property searches and to instead rely on outdated searches when preparing documentation in relation to a property transaction. The court determined that the solicitors had made a negligent mis-statement when erroneously saying that a property was not affected by flood controls, noting that new searches would have revealed that the land was flood affected.”

The solicitor made this statement based on outdated information and was not given instructions to obtain new searches.

The Court did, however, determine that PPK did not suffer any compensable loss arising out of this erroneous misstatement.

In both of these cases, the firms were at fault for either failing to advise or failing to signpost information where it has been demonstrably available for the lawyer or conveyancer to access.



Response from Government and Legal Bodies



With developments with guidance in another comparable jurisdiction (UK) and in line with a sea change with a new Government and new attitude to the impact of climate change, it is clear that there is momentum building with regard to greater consumer protection and national resilience.

From what has been a slow start, the pace is quickening. In 2021, The Law Council of Australia published their [climate change policy](#).

In the summary, they stated that “lawyers should be alive to the unfolding legal implications of climate change and its consequences, and **they should be informed, skilled and ready to assist clients on climate change-related legal matters**, within their areas of skill and competence.”

President Dr Jacoba Brasch KC said:

“We must ensure the legal implications of climate change are as well understood as the physical risks it presents.”

“The legal implications of climate change are currently being tested in our courts and tribunals, but we need to proactively adapt to be ready for the future.”

“The legal profession will have a lead role in advocating for, and assessing, federal and national law and policy reforms responding to climate change. Rule of law principles must also be observed, including that the law should promote certainty and clarity in this area.”

“In accordance with their professional obligations, individual lawyers will need to be alive to the unfolding legal implications of climate change and its consequences and ready to assist clients on climate change-related matters within their areas of skill and competence.”



Response from Government and Legal Bodies *(continued)*



The Government Treasury Department has also started to pave the way for the development of a climate disclosure risk framework and mandatory reporting. **A first consultation** was released in December 2022, with the objective of:

"...ensuring large businesses and financial institutions provide Australians and investors with greater transparency and accountability when it comes to their climate-related plans, financial risks, and opportunities. As part of this commitment, the Government will introduce standardised, internationally-aligned reporting requirements for businesses to make disclosures regarding governance, strategy, risk management, targets and metrics – including greenhouse gases."

A second consultation paper was launched in June 2023. The new consultation follows up on the feedback from the initial paper, with detailed disclosure proposals, and seeks input on the workability of the proposed coverage, content, framework and enforcement rules.

The paper notes that stakeholders responding to the initial consultation *"were almost universally supportive of the Government mandating climate-related risk disclosures."* There are implications for compliance reporting for larger law firms as part of their wider ESG policies. This reporting may extend to not just the firms' own emissions but how they engage with their markets on ethical advice.

The New South Wales Law Society is perhaps the most proactive Lead Association to date and has established a **Working Group** to consider how best to support members and to develop its advocacy work on how to respond to the climate challenge from a legal perspective.

Responding to the Law Council of Australia's call for greater education and resources for legal practitioners, the Working Group has a specific objective to establish education resources, guidance material and CPD content. We understand that the Society continues to review the UK Law Society Guidance and its core principles, as well as a newly published legal opinion from the pre-eminent environmental law team at Norton Rose Fulbright, details of which can be found below.



New Legal Opinion - Norton Rose Fulbright

Introduction

Early in 2023, we commissioned the environmental practice of Norton Rose Fulbright, led by Partner Elizabeth Wild, to consider and develop a new legal opinion on whether NSW Real Estate Lawyers owe their clients a duty of care to advise and warn. Published at the end of May 2023, the Opinion is now being considered by The Australian Law Commission, The NSW Law Society, The Australian Institute of Conveyancers (AIC) and National Environmental Law Association (NELA).



Download your full copy of the Legal Opinion



Duty of care and duty to warn

Real estate lawyers and conveyancers have a duty of care to advise and warn their clients about climate risks. This duty is based on the tort of negligence and contract, as well as potentially the law of misleading or deceptive conduct, which is a statutory cause of action under the Australian Consumer Law (ACL) including sections 18 and 30 of Schedule 2 of the Competition and Consumer Act 2010.

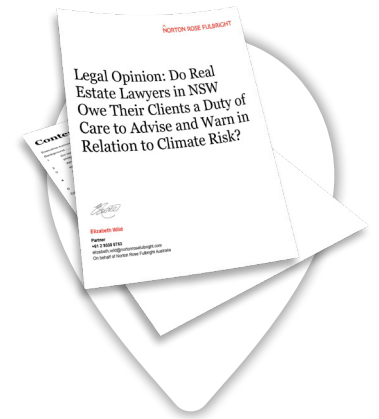
Whilst when the duty of care to advise on climate risks is factually dependent and vary from case to case, it is considered that lawyers are currently obliged to advise on climate risks and were potentially obliged to do as early as 2021.

Risks

Climate change risks take a number of forms:

- **Physical risks** - these are the most obvious to real estate assets and are caused by damage resulting from natural disasters including flooding, bushfires and coastal erosion.

New Legal Opinion *(continued)*



- **Transition risks** - relate to changes in the behaviour of regulators, commercial institutions (such as banks and insurers) and the community due to climate change.

While there is increasing awareness and information available in NSW in relation to the physical and transition risks associated with climate change, it is not presently common practice for real estate lawyers to advise or warn their clients of those risks.

As a consequence, large portions of the legal profession in NSW may be failing to adequately consider how climate risks should inform their day to day practices. This omission is increasing lawyers' (and likely other professions) exposure to **liability risks**.

- **Liability risks** are the risk that clients and others will seek compensation from their professional advisors for the losses which they have suffered from the physical and transition risks of climate change.

Discharging the duty

There are several steps that a lawyer could take:

- Warning their client of any obvious practical implications of climate change for the subject property and the proposed transaction. Such implications may include the risk that:
 - The property may be discharged by natural disasters with increasing regularity and/or severity;
 - The value, insurability, availability of finance and/or development potential of the subject property may be adversely affected;
- Recommending to their client that they obtain further advice from relevant specialists (such as a valuer, planner, engineer or environmental consultant); and/or
- If a report or tool were available analysing the risks which climate change presents to a particular property, recommending that their clients obtain such a report and assist them to understand its implications.

New Legal Opinion *(continued)*

Retainer

Lawyers may choose to exclude advising on climate change and the associated risks from the scope of their retainer. Whilst the lawyer may protect themselves from liability under the law of contract, Breach of Contract is not the only available course of action. Claims under negligence and the ACL may still succeed.

In summary, it is possible that a successful claim may still be made against a lawyer who fails to advise their client of the obvious implications of climate change, notwithstanding the fact that such issues were excluded from the retainer.

Risk for lawyers

Failure by the lawyer to discharge their duty of care may result in being liable to pay damages, becoming embodied in costly and time consuming disputes, disciplinary action and reputational damage, increased insurance premiums and business losses.

Climate data and reports

With the emergence of reports and tools becoming available, it is considered that a property specific report should be obtained as this would greatly assist lawyers to fulfil their obligations and minimise the risk of claims.

Potential Consequences of failing to advise

Lawyers and conveyancers face serious consequences for failing to advise their clients in relation to climate risks. These consequences include:

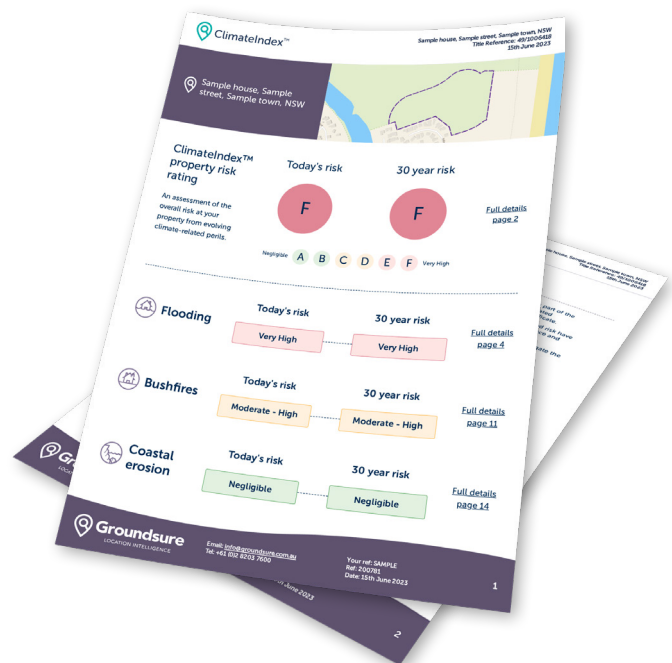
- Claims made against them in negligence and also with respect to misleading or deceptive conduct;
- Damages ordered against them;
- Loss of business and increased professional indemnity insurance premiums;
- Reputational damage; and
- Disciplinary action, by the applicable disciplinary body, which in NSW is The Office of the NSW Legal Services Commissioner.

Meeting your duties, supporting your client

Our mission is to ensure that our climate-challenged society makes positive, sustainable and responsible land and property decisions. This applies especially to how property lawyers engage with their clients. There is a lot to absorb with the potential changes to the legal landscape in the same way that the climate is shaping it.

But we are here to help. In June 2023, we launched The ClimateIndex™ Report. Available initially in New South Wales, this is the first desktop report on current and future climate risks specifically for use by conveyancers and lawyers for property due diligence. It supports the key elements of the duty of care, duty to warn and disclose that are a key part of the Norton Rose Fulbright legal opinion that could pave the way for the Lead Associations' updated guidance.

Find out more about ClimateIndex™:



Watch our video:



How to order



The Groundsure ClimateIndex™ Report is **available to order now through InfoTrack** for New South Wales properties.



For more information on ClimateIndex, speak to your InfoTrack account manager or email us at info@groundsure.com.au.

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Groundsure is a leading environmental and climate data authority. We give land and property professionals expert information on risks including land contamination, flooding and ground stability, as well as forward guidance on potential climate risks, to advise their clients in the transaction. We provide high value, property-specific opinions and analysis of land use, turning data into practical, actionable insight.



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