



Summary of Norton Rose Fulbright's Opinion on Climate Risks In Property Transactions.

'Do Real Estate Lawyers in NSW Owe Their Clients
a Duty of Care to Advise and Warn in Relation to
Climate Risk?', 30th May 2023

Norton Rose Legal Opinion on Climate Risk

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

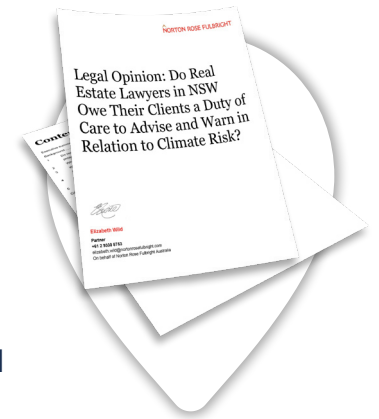


Duty of care and duty to warn

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.

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

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;



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- 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.

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

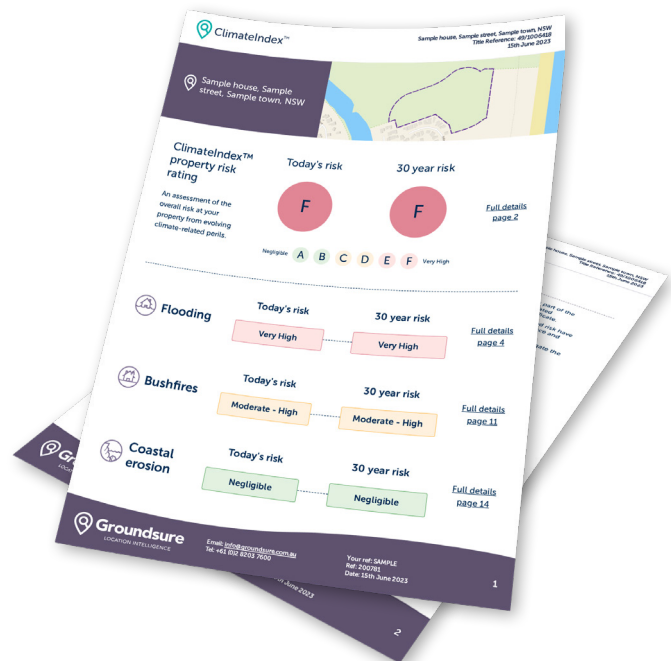
With the emergence of reports and tools becoming available, it is considered that a property specific report should be obtained as this would greatly assist lawyers to fulfil their obligations and minimise the risk of claims.

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**.





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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