



The New South Wales Law Society Guidance on Climate Risks - A Summary Guide

Introduction



The extreme flooding and bushfires we have witnessed in recent years has been the clearest proof that our weather events are getting more severe more often. Climate impacts over the coming decades will perhaps be most felt by residential and commercial property asset owners, in terms of value loss, damage, insurance and lending issues. Not least is the emotional impact on households and business owners affected.

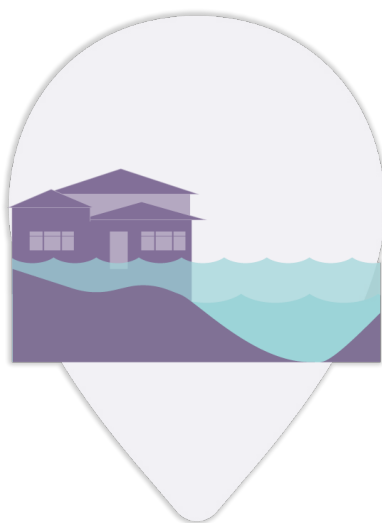
Ensuring your client is aware of this where information is available is now a key part of the new NSW Law Society Guidance on Climate Risks and your duties as conveyancers and real estate lawyers. This paper summarises the new Guidance and the most effective way to discharge your duties and to communicate potential risks to your client.

The scale of climate risk



\$13 Billion

The amount paid out in climate related claims since 2019



\$9.6 Billion

The estimated cost of the East Coast river flooding in 2022



\$25 Billion

worth of property assets exposed to coastal erosion



Introduction *(continued)*



11 Million Hectares

the amount of land that was burnt by the **black summer bushfires**



\$1.2 Billion

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



240,000

the number of insurance claims for flooding between Jan and Oct 2022

What are the types of climate risk?

Physical risks

These risks are associated with climate change-related weather events, such as rising temperatures and sea levels, and an increased frequency and intensity of extreme weather events, such as flooding, bushfires and coastal erosion.

Transitional risks

These are risks that arise from changes in regulation or legislation and could relate to requirements to meet energy performance standards in properties, changes to legal duties or banking and insurance compliance requirements, for example.

What are the types of climate risk? *(continued)*

Liability risks

These are risks where a firm could be held to account for contributing to, or failing to adapt to or advising about climate change risks, and include:

- Legal liabilities for law firms, governments and organisations from clients or businesses seeking compensation for losses arising in relation to physical or transition risks.
- Potential risk of negligence claims in the event of inaccurate advice or failure to warn of upcoming legal requirements
- Client exposure to litigation - including for greenwashing and costs associated with climate change litigation.

The impact of climate risks on clients

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



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.

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.



Background to the Guidance

Set against this context, there has been growing concern about the protection afforded to Australian society from current and accelerating future climate threats and the role of legal services in adopting a more climate-conscious approach to advice.

The Law Council of Australia published its *Climate Change Policy* in November 2021. The Policy states that lawyers should advise clients on the legal implications of climate change in accordance with professional standards and legal ethics.

It highlighted an **evolving duty of care owed by solicitors to their clients** to provide advice regarding a legal problem which meaningfully addresses any climate change issues and related consequences.

It emphasised that *“lawyers should be alive to the unfolding 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”*

“Lawyers should be aware that advice regarding a legal problem should be provided in a manner which meaningfully addresses any identified climate change issues and consequences”.. (see paragraphs 53 to 56).

In April 2023, the Law Society of England and Wales also published '*Guidance on the Impact of Climate Change on Solicitors*' (*LSEW Guidance*), and stated that the LSEW Guidance is relevant to all its members.

Key points from the NSW Law Society Guidance



The NSW Law Society has now followed suit and has brought forward its [Guidance on Climate Risks](#), which was published following a launch event on 27th February 2024.

It follows many of the core principles surrounding the Duties that are expressed in the England and Wales Guidance. The headlines are as follows:

1) Solicitors have a **general legal duty to exercise reasonable skill and care**. The standard is that of a reasonably competent practitioner (see Oliver J in *Midland Bank Trust Co Ltd v Hett Stubbs and Kemp* [1979] Ch384 at 403).

Courts have been inclined to find that a solicitor is **obliged to warn their client of a risk associated with a transaction**. These include where a solicitor is **aware of information pertinent to their client's interest and /or is aware of obvious risks**.

2) Solicitors have a **general legal duty to exercise reasonable skill and care**. The standard is that of a reasonably competent practitioner (see Oliver J in *Midland Bank Trust Co Ltd v Hett Stubbs and Kemp* [1979] Ch384 at 403).

In *Provident Capital Ltd v Papa* [2013] NSWCA 36; (2013) 84 NSWLR 231, Macfarlan JA (Allsop P and Sackville AJA agreeing) said (at [80]): *"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 subject of advice."*

This may extend to information obtained while fulfilling the solicitor's retainer, **whether or not the matter in question is strictly within the scope of the retainer** or not (see, for example, *Kumar v Western Sydney Realty Pty Ltd v Anor (No 2)* [2021] NSWDC 446).

The duty to warn should be addressed **at all stages of giving advice to a client**. A solicitor may have a greater obligation, where the solicitor is aware that the client is particularly vulnerable, whether from lack of information or otherwise, to offer warnings or information that is incidental to the legal work being carried out to ensure that the client understands the full ramifications of the undertaking.



Key points from the NSW Law Society Guidance (continued)

3) Solicitors have a **duty to disclose to their client all information material to that matter of which they have actual knowledge**. In the context of climate change, this means that where a solicitor becomes aware, while acting in a matter, that there are climate legal risks which might impact the client's interests in-scope of the retainer, the **solicitor should disclose such risks to their client in a clear and understandable way**.

It also quotes rule 7.1 of the Legal Profession Uniform Law Australian Solicitors Conduct Rules 2015 which provides: *"A solicitor must provide clear and timely advice to assist a client to understand relevant legal issues and to make informed choices about action to be taken during the course of a matter, consistent with the terms of the engagement."*

Solicitors should, among other things:

- **Maintain the level of competence** and legal knowledge needed to practise effectively, considering changes in practice context and developments in the law, including in relation to climate risks
- **Inform clients, in a timely way, of key facts and issues, including risks and mitigation strategies.**

Implications for legal professionals

1) You are not climate scientists - seek expert help.

The guidance goes on to state that *"A solicitor who does not have the relevant knowledge of the impact of climate change on the legal area they are advising on should not provide advice if it is outside their knowledge or competence. When a solicitor identifies a legal risk but considers they are unable to advise, the solicitor should liaise with their client about seeking specialist third-party assistance, such as technical consultants."*

It states that : *"Solicitors....must advise their client of the obvious practical implications of the client entering into the transaction the subject of the advice, but **should not, however, provide opinions which they are not qualified to give.**"*



Implications for legal professionals *(continued)*

2) On excluding from the retainer.

As per the [Stephen Tromans KC Legal Opinion](#) that helped develop the LSEW Guidance, the guidance makes reference that: "It may be possible, in some circumstances, to limit the scope of the retainer to expressly exclude climate issues, for example the solicitor is not competent to advise or where the client is obtaining their own technical advice. It would be prudent to ensure that there is a written record of that agreement."

This could be part of a waiver, for example, in a fast-paced local property market where offers are made with limited due diligence. But it would **need to be done with the client's full knowledge that they have chosen to override any climate risks that could affect their ability to get insurance or lending, for example.**

As the LSEW Guidance notes, where climate legal risks are relevant, limiting the retainer in this way may be undesirable, competitively and reputationally, for some firms to try to carve out climate legal risks from the retainer other than in narrow and specialised circumstances.

The Guidance and Real Estate Transactions

Solicitors and conveyancers should advise on legal risks associated with the physical impacts of climate change, including risk allocation in a transaction, climate risks disclosed in transaction documents, limitations of disclosure obligations in relation to climate risks and how they impact real estate ownership and use, such as inaccessibility, uninsurability and unavailability of capital investment (which would include mortgages).



So, there is clear guidance on the core duties, the need for conveyancers and lawyers to be well educated about climate risks but seek third party advice where they are not experts.

There is also a clear need for firms to ensure that property clients get climate risk insight in an easy way that mitigates the firm's risk and supports compliance with the new NSW Law Society Guidance.

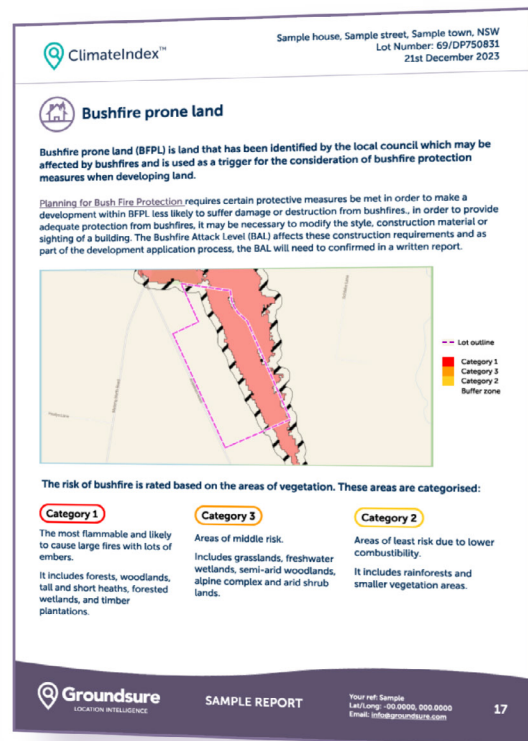
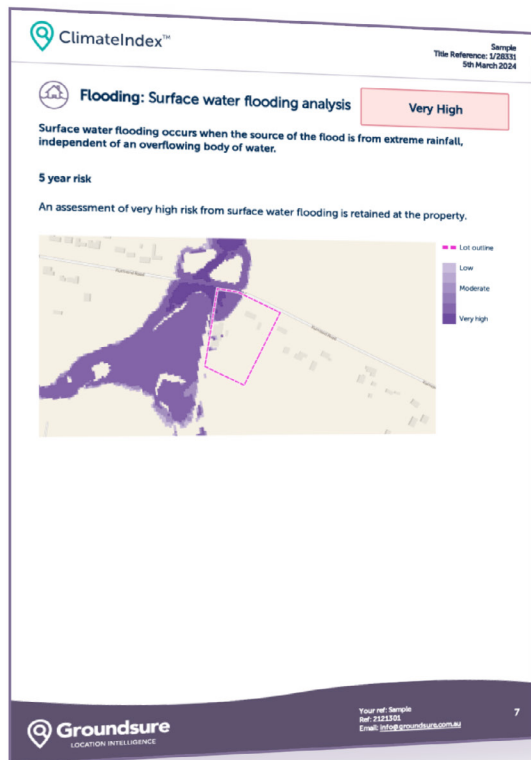
The way to discharge your duty: The Groundsure ClimateIndex™ Report

Launched initially in New South Wales in June 2023, this is the first desktop report on current and future climate risks specifically for use by conveyancers and lawyers for property due diligence.

Built on trusted national data sources and our own predictive climate modelling, 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* and now enshrined in the NSW LS Guidance.

The report identifies the 3 key physical risks: flooding, bushfires and coastal erosion, with a current, 5-year and 30-year forward risk prediction in a clear, 3-tier traffic light system. With full colour mapping, it also offers your client next steps specific to each identified risk.

This makes it cheaper and more efficient for the lawyer and provides improved insight to support the prevailing 10.7 Certificate. This typically looks at only past events without signposting to what the future trend could be. Whereas, ClimateIndex provides property-specific assessments for individual residences into the future, instead of broad, static area ratings.



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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