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RESPONDING TO LITIGATION RISK FROM CLIMATE CHANGE - INFORMED DECISION MAKING

CLIMATE CHANGE UPDATE

In the last few weeks, several major organisations, including the OECD and the US federal government, have released reports on the need to deal with climate change risk. Significantly, the world's largest global insurance market, Lloyds, has spoken out portentously about the need for decisions concerning long-term commitments to take into account climate change projections. In the following article, we look at some of the key findings from these reports and how one insurer is seeking to proactively effect change through litigation against local governments. The clear message is that uninformed decision making is putting organisations at risk.

INSURERS, LOCAL GOVERNMENTS AND CLIMATE RISK

The Organisation for Economic Co-Operation and Development (OECD) recently described climate change as 'one of today's greatest economic challenges' and called on its 36 member countries (of which Australia is one) to align their policies towards low-carbon growth.¹ The release of the OECD statement coincided with the release of the US's quadrennial National Climate Assessment (NCA). The NCA too calls for revision of policy but also legal codes, building and infrastructure

standards, and urban planning, to understand and overcome barriers to adaptation to climate change.

In the absence of clear climate change policy, government is increasingly at risk of litigation.² The NCA points out that government has the capacity, in its legal role, to make land-use decisions to adapt to the impacts of climate change.³ However, the report also notes that support is necessary from higher levels of government to enable local governments to face

¹ OECD, *OECD countries commit to work towards a climate deal for 2015*, accessed 9 May 2014, <https://student.unsw.edu.au/how-do-i-cite-electronic-sources/>; See the full OECD statement on climate change here <http://www.oecd.org/mcm/MCM-2014-Statement-Climate-Change.pdf>

² Bell, J. and Baker-Jones, M. *Retreat from retreat - the backward evolution of sea-level rise policy in Australia, and the implications for local government* (2014) 19 LGLJ 23 http://www.dlapiper.com/~media/Files/Other/2014/Retreat_from_retreat.pdf

³ Melillo, Jerry M., Terese (T.C.) Richmond, and Gary W. Yohe, Eds., 2014: *Climate Change Impacts in the United States: The Third National Climate Assessment*. U.S. Global Change Research Program, 841 pp. doi:10.7930/J0Z31WJ2, p 331 <http://nca2014.globalchange.gov/>

limitations of legal authority, geographic jurisdiction, and resource constraints.⁴

This absence of support, coupled with a failure to make informed land use planning decisions can increase a local government's risk of exposure to litigation. This is particularly true where a local government is perceived to have acted negligently because of a failure to act appropriately, or a failure to respond at all, to the impacts of climate change.⁵ This was made strikingly clear when recently insurers in the US filed a class action claim against local governments in the Cook County region. The action is against a large defendant class of local governments, which includes approximately 100 cities, villages and townships along with the City of Chicago and the Metropolitan Water Reclamation District of Greater Chicago, an independent state agency.⁶ The action is led by the Illinois Farmers Insurance Company but includes all its subsidiaries and the people it insures. The insurer claims that the local governments, as the sole authorities charged with supervising and coordinating stormwater management across the municipalities, through their negligence to adopt reasonable stormwater management practices, caused economic loss to the plaintiffs. The insurer claims that the local governments should have known about the increase in intensity, duration and frequency in rainfall from climate change, and failed to adopt and implement policies to deal with the impacts. Consequently, the claim is that local governments breached their duty to the plaintiffs by failing to provide safe, adequate mitigation and stormwater storage and conveyance.

Although it may at first appear remarkable that the action is being brought by insurers, it may be less of a surprise to the insurance industry. This week,

Lloyds, in its latest report, states that 'climate change projection based approaches are required for those making long-term commitments, for example, insuring or investing in infrastructure'.⁷ Here in Australia the insurance industry has also raised the issue. The Executive Director and CEO of the Insurance Council of Australia, Robert Whelan, recently called for a more prudent approach to building communities in areas exposed to extreme weather. Mr Whelan suggested greater attention be given to land-use planning. He also acknowledged the importance of the price signal that insurance sends about the need to adapt and reduce risk from climate change impacts, but cautioned that the price signals 'are only useful if they are observed, understood and generate action'.⁸

CONCLUSION

The message being sent from the insurance industry and acutely demonstrated in the action against the City of Chicago is that it is not the physical impacts on assets that are the main concern when dealing with the impacts of climate change. The primary concern for those charged with land use planning and development of infrastructure lies with decision making - how those assets are dealt with and how they are planned, managed and operated in light of the physical impacts. Local governments, and those involved in the development of long term infrastructure in particular, need to decide how to deal with the impacts of climate change. Unfortunately, as the NCA points out, there is currently very little information available to evaluate the implications for decision-making and planning, including legal, social, political, and other decisions.⁹

⁴ Melillo, Jerry M., Terese (T.C.) Richmond, and Gary W. Yohe, Eds., 2014: *Climate Change Impacts in the United States: The Third National Climate Assessment*. U.S. Global Change Research Program, 841 pp. doi:10.7930/J0Z31WJ2, p 382.

⁵ In *Vaughan v Byron Shire Council*; *Byron Shire Council v Vaughan* [2009] NSWLEC 88; *Vaughan v Byron Shire Council*; *Byron Shire Council v Vaughan (No 2)* [2009] NSWLEC 110; *Vaughan v Byron Shire Council*; *Byron Shire Council v Vaughan* (NSW Land and Environment Court proceedings 40342 and 40344 of 2009), a coastal property owner that allegedly suffered damage as a consequence of protective work carried out by the council, successfully brought proceedings against the council for the damage; see also *Taip v E Gippsland Shire Council* [2010] VCAT 1222; *Gippsland Coastal Bd v South Gippsland Shire Council (No 2)* [2008] VCAT 1545.

⁶ 20140416 Illinois Farmers Ins. v. Metro. Water Reclamation Dist. of Greater Chicago <http://www.climatelawyers.com/file.axd?file=2014%2f5%2f20140416+Illinois+Farmers+Ins.+v.+Metro.+Water+Reclamation+Dist.+of+Greater+Chicago.pdf>

⁷ Lloyds 2014 *Catastrophic Modelling and Climate Change*, p 32 <http://www.lloyds.com/~media/Lloyds/Reports/Emerging%20Risk%20Reports/CC%20and%20modelling%20template%20V6.pdf>

⁸ Insurance Council of Australia 2013 *The Year In Review*, p 5 <http://www.insurancecouncil.com.au/assets/report/Year%20in%20Review%202013%20spreads.pdf> See also Baker-Jones, M, 2014 *Planning Reform and Policy Response to Climate Change* Insurance Review DLA Piper, p 29 <http://viewer.zmags.com/publication/70e832e7#/70e832e7/1>

⁹ Melillo, Jerry M., Terese (T.C.) Richmond, and Gary W. Yohe, Eds., 2014: *Climate Change Impacts in the United States: The Third National Climate Assessment*. U.S. Global Change Research Program, 841 pp. doi:10.7930/J0Z31WJ2, p 258

GUIDELINES FOR DECISION MAKERS

Drawing on experience representing local governments in Australia, DLA Piper has found that there are two key things that a decision maker can do to immediately minimise its climate legal risk:

- **Assess its relative position:** That is, establish its level of risk relative to other comparable organisations. Why? Because the reasonableness of an organisation's response to climate change will be determined in the context of comparable responses from the broader community.
- **Obtain informed guidance on decision-making:** In terms of litigation risk, it is the decision makers that present the greatest exposure. Almost all climate change litigation in Australia and overseas has arisen from ill-informed decision making.

DLA Piper can provide decision-making Guidelines to deal with the impacts of climate change. The Guidelines will take into account the physical and legal impacts of climate change and present specific, tailored procedures and protocols that individual decision makers at all levels can follow to minimise the risk of legal challenge.

Please let us know if you have any queries about climate risk in general or how the Guidelines can specifically work to manage and minimise an organisation's legal risk.

MORE INFORMATION

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