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PLANNING UPDATE

UNWELCOME OUTCOMES FOR ORGANISATIONS THAT FAIL TO TAKE INTO ACCOUNT CLIMATE LEGAL RISK

We recently provided a client update on the Queensland Planning and Environment Court decision of *Rainbow Shores P/L v Gympie Regional Council & Ors*¹ ([view here](#)). The decision in *Rainbow Shores* provides an example of what happens when there is a partial or complete failure to account for climate legal risk. The purpose of this update is to consider the implications for organisations, like state and local governments and private corporations, if they make the same mistake.²

Climate legal risk explained

Climate legal risk is the risk of legal liability or adverse legal outcomes that can arise when the impacts of climate change affect an organisation's operations.

The impacts are varied and can be direct, like those brought about by the increased intensity and frequency of flooding³, bushfire and coastal hazards such as coastal erosion, storm tide and sea level rise inundation. But more often than not it is the indirect impacts, such as the risk of litigation, noncompliance with regulatory requirements, or insurance failure, that cause greater concern because they give rise to issues that can often be more difficult to resolve.

Climate legal risk is one of the risks that results from these indirect impacts. Put simply, it is the legal risk that comes about when the impacts of climate change affect an organisation's common law or statutory duties and can result not only in project failure (as was the case in *Rainbow Shores*) but in subsequent legal action against an organisation by its stakeholders and in some cases by third parties.

¹ [2013] QPEC 26

² For detailed commentary on climate legal risk see, Johnston, GS, Burton, DL, Baker-Jones, M, 2013 *Climate Change Adaptation in the Boardroom National Climate Change Adaptation Research Facility, Gold Coast*

³ Typically "the temporary inundation of land by expanses of water that overtop the natural or artificial banks of a creek, river, lake or estuary resulting from prolonged or intense rainfall in the catchments of these water bodies", Queensland Government 2013, State Planning Policy mandatory requirements: flooding hazard, p5

While it is most commonly associated with environmental legal risk, climate legal risk is now observable as a component of all legal risk.

Climate legal risk is an issue for all

Both private and public organisations are affected. Broad considerations imposed under legislation increasingly require decision makers to take climate change into account. For example, entities conferred with functions or powers under planning legislation in Queensland are required to take into account the short and long-term environmental effects of development at local, regional, State and wider levels, including the effects of development on climate change.⁴ The obligation to consider climate risk is explicit in certain planning instruments, such as the draft State Planning Policy mandatory requirements, which, as a core concept, states⁵:

"Rising sea levels due to climate change are clearly demonstrated in current scientific literature. Sea levels are projected to continue to rise at an accelerating rate to 2100 and beyond, and the severity of cyclones is expected to increase. These factors will increase the area at risk from coastal hazards and will compound the vulnerability of low-lying coastal areas to coastal hazard impacts.

Land-use planning decisions have long-term implications and urban development cannot be easily relocated. Therefore planning and development decisions will need to take this projected increase in risk into account. Adaptation planning will become a progressively more important requirement for at-risk coastal communities."

Assessing, evaluating and treating climate legal risk

Organisations need to ensure that they have considered, and can respond to, their climate legal risk. This means accounting for and managing climate legal risk and incorporating the climate legal risk management process into the organisation's overall risk management strategy.

In order to mitigate climate legal risk, organisations need to obtain sound advice at the early stages of project planning. This includes:

- reviewing the project proposal in light of the potential climate change impacts and anticipating and considering any legal challenge;
- making adequate and early disclosure to shareholders, investors and other stakeholders about potential climate change legal risks;
- engaging experts that are qualified and experienced enough to advise on the climate change position and the evidence that might be put forward;
- obtaining advice from consultants who understand potential climate change impacts about the project and obtaining their recommendations on strategy, procedural approaches and, if necessary, design changes;
- where relevant, obtaining advice and recommendations from coastal engineers, bushfire consultants, geologists etc, who understand the potential impacts of climate change and who can come up with protection and mitigation alternatives;
- reviewing procedures and agreements to ensure they take into account climate change related litigation - for example, reviewing insurance policies to make sure they cover climate legal risk such as climate change related litigation.

None of these steps is particularly difficult or costly if carried out early enough - ideally as part of the project due diligence. Early recognition and management of climate legal risk can potentially avoid unanticipated and oppressive holding costs, unnecessary legal and consultant fees, damage to reputation, delays measured in months and sometimes years, or catastrophic project failure. It can also reduce the risk of subsequent legal claims by affected stakeholders.

⁴ *Sustainable Planning Act 2009* (Qld), s 5

⁵ Queensland Government 2013, *State Planning Policy mandatory requirements: coastal hazard*, p5

Key point summary

There are two very important messages that organisations need to accept:

- Organisations that deal with or interact with the natural environment need to ensure that legal risk is an integral part of their risk management process; and
- The climate legal risk management process must be part of the organisation's overall strategy.

Understanding and managing climate legal risk involves:

- 1 Identifying physical climate risks, with a view to determining the range of legal decisions that may be required to be made as a consequence of the physical risk to which the corporation is exposed.
- 2 Analysing how the relevant law regulates the issue at stake (ie, a hypothetical application of the law). This will involve identifying what, why, where, when and how climate events could impact the achievement of the organisation's objectives by assessing what impact the applicable law and other relevant material may have on the rights and duties of the organisation.
- 3 Evaluating how the legal outcome serves the organisation's interests by distinguishing between acceptable legal risks and those legal risks that should be considered for treatment.
- 4 Treating climate legal risk by developing organisational resilience.

MORE INFORMATION

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