

Coastal Councils: Mitigating legal risks arising from predicted climate change impacts

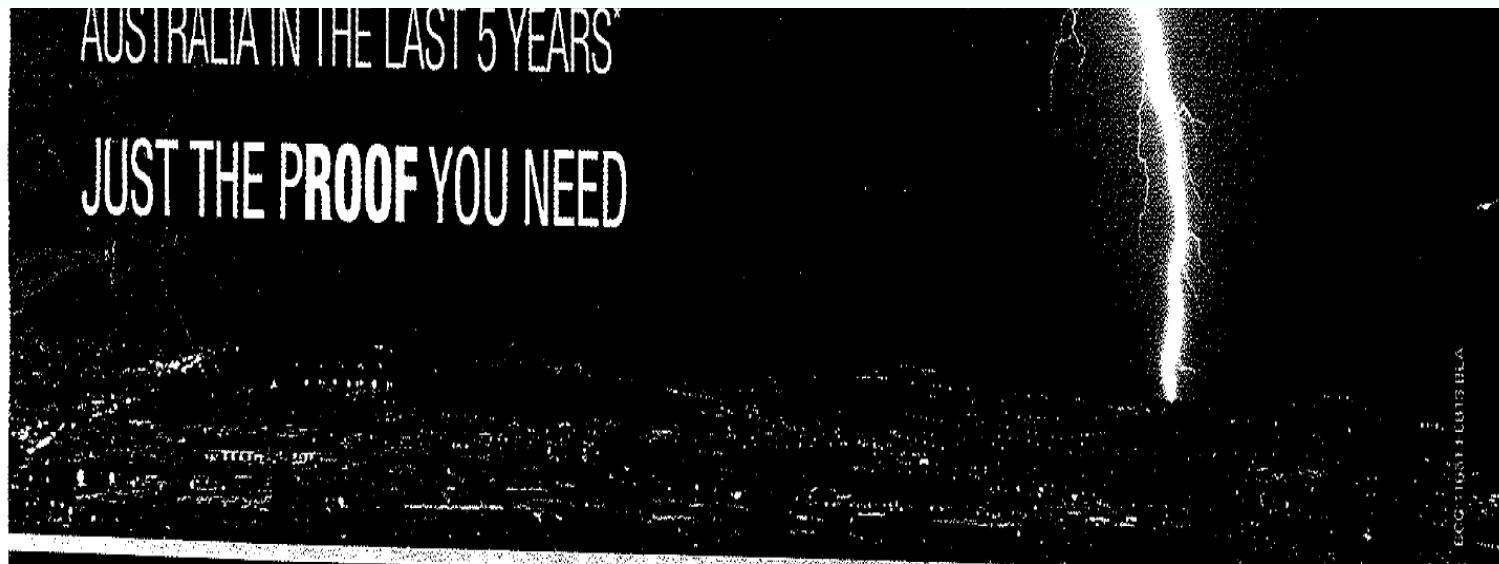
Andrew Beatty and Ballanda Sack
Beatty Legal

Australian Coastal Councils Conference
Adelaide, 25 March 2013

Outline

- Acts of God, acts of man...and lawyers
- Climate change: the incoming tide?
- Legally actionable decisions by coastal LGAs
- Reducing risks: case studies
- Reducing risks: tips
- Q and A (and more in this afternoon's workshop)

Acts of God, acts of man...and lawyers



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*Insurance Council of Australia, 2012. The financial cost of natural disasters is derived from the submissions of general insurance companies following large events incurring cost to the community and insurers. It does not represent the entire cost of the event, and is only a approximation of the insured loss based upon reported data. The final loss figure for an event can take many years to resolve. Events are only recorded where there is a potential for the insured loss to exceed \$10 million.

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Acts of God, acts of man...and lawyers

www.afr.com The Weekend Australian Financial Review

February 2-3, 2013 21

Perspective

Who'd want to live in Queensland

When disaster strikes twice in the same place, people start to question the wisdom of staying put but, for many, moving brings little comfort.

Matthew Cranston

Queensland's two flood disasters in two years have claimed 40 lives, left thousands of residents displaced and thousands of homes and businesses inundated and ruined.

Insurance premiums have gone through the roof – even for those unaffected by floods – and at this point the disasters have cost the state economy more than \$7 billion.

Pity more money had not been pre-emptively spent on upgrading flood mitigation infrastructure, say the critics, who note that this might have helped prevent floods, protect the reputation of a city and keep premiums affordable.

Mitigation could involve anything from building levees, transferring substations to higher ground, improving dam walls. The list is endless.

Insurance Council of Australia chief executive Rob Whelan has called for it, the Natural Disaster



Staying put ... restaurateur John Kilroy outside his sandbagged eatery on the Riverside boardwalk.

Photo Glenn Hunt

Major hits

Natural disaster claims >\$100m* (\$bn)

"So they go to the bank and ask to use the equity but the bank says, 'no, your house is worth \$400,000 now – the \$100,000 is gone'."

Cuthbert also takes issue with some of the practices developed over the past few decades such as allowing development in flood-prone areas. "I would never support a council approving the development of land clearly marked as a flood-prone area."

But developments still get approved. Only a year after the 2011 flood, Pradella group's Waters Edge development at West End in Brisbane recorded more than \$10 million in sales.

"The riverfront market took a hit last year but the exceptional sales results and high level of inquiry we have had this year proves buyers are falling in love with the Brisbane River all over again," the group's development manager, Brett Lentz, said at the time.

Cuthbert says bad habits, and not just the critical need for infrastructure, have been a major cause of flood damage.

"We lost our corporate memory," he says of Brisbane's 1974 flood. "And so we started putting four bedrooms and an ensuite and a rumpus room underneath the old Queenslander – there was suburb after suburb of this."

The "Queenslander" home is known for its high perch to allow for

Acts of God, acts of man...and lawyers

MY SMALL BUSINESS
Waxing lyrical
PAGES 6-7



MICHAEL WEST
Drivers could save
generators a shock
PAGE 5



SPORT
Are these the best
fans in football?
PAGE 20



The Sydney Morning Herald

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Premiums soar as peril worsens

PETER HANNAM
INSURANCE

AUSTRALIA has been re-rated on international re-insurance markets after another summer of flooding and extreme weather raised the country's peril profile, Rob Whelan, chief executive of the Insurance Council of Australia, has said.

As a result, Australian insurers must pay more for re-insurance, costs they will pass on to customers. "Those

of September and 13.9 per cent for commercial property insurance.

Flood coverage premiums have soared, with increases of 300 per cent or more prompting holders in flood-risk areas to drop cover.

Mr Whelan defended the tougher line on flood insurance. "Insurers must rate to risk," he said. "If they don't, they have a real difficulty in terms of solvency."

Insured losses from the ex-cyclone Oswald now exceed \$732 million with 70,000 claims.

The losses remain a fraction of the \$2.5 billion from the 2011 Queensland floods but the tally will rise. It excludes losses from bushfires, which are also certain to rise as Victorian and West Australian authorities continue to battle blazes.

Heinrich Eder, managing director of Munich Re for Australasia, said the disasters in January showed "the vulnerability of Australia" to natural perils "especially weather-related catastrophes". Such events have more than tripled in the past three decades "and this trend is most likely to continue", he said.



Risk factors ... disasters have become more frequent. Photo: Andy Zakell

A spokeswoman for rival reinsurer Swiss Re said: "When natural catastrophes happen, the insurance industry uses the claims data to update the models used to assess and price risk."

In its submission to the Senate inquiry into extreme weather preparedness, which holds its first hearings in Melbourne on Wednesday,

IAG says rainfall analysis suggests "an increased frequency of major river flooding in a fairly large area" of central WA and the region taking in central South Australia, south-west Queensland and inland NSW "for the warmer part of the year".

Addresses with "extreme" risk from floods number 3860 in NSW and 51,506 in Queensland.

**Westpac maroons
Queensland and
NSW homeowners**
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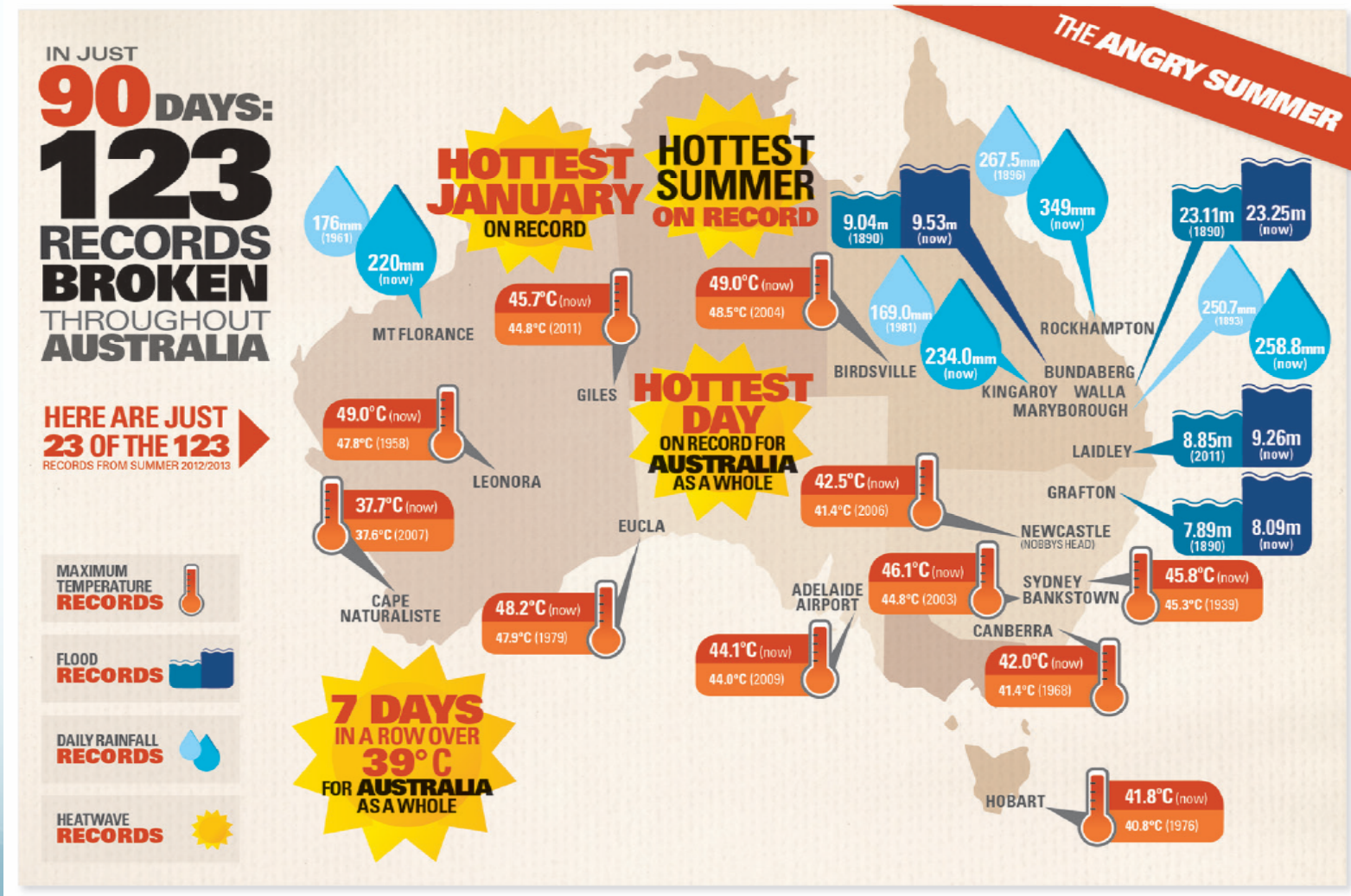
[re-insurance] premiums have increased in some cases by as much as 50 per cent," Mr Whelan said.

Many policyholders have expressed anger at sharp increases in premiums. Data from the Australian Prudential Regulation Authority indicate premiums rose 16.4 per cent for domestic home and contents coverage in the year to the end

Acts of God, acts of man...and lawyers

- We've always had a climate that changes, but by how much?
- In any case, does it matter? Judges rarely say "I cannot decide who is to blame for this damage?"

Climate change and the incoming tide



Climate change and the incoming tide

- Unfortunately, it does not matter what you think about climate change – the opinions that really matter belong to insurers (early adapters), bankers, scientists (esp. CSIRO and BoM) and Planning Courts and Tribunals

Legally actionable decisions by coastal LGAs in a changing climate [1]

- At law, decisions include non-decisions: ostriches aren't safe
- What did you know?
- Where are your “SLAT maps”?
- Your vulnerability arises when you: impart information on which third parties rely, discharge your statutory functions and make decisions – in other words **WHEN YOU DO YOUR JOB**

Legally actionable decisions by coastal LGAs in a changing climate [2]

- Risks arise if you take into account that which you should not, fail to take into account that which you should, or if you just get it obviously wrong on the facts
- Information which is relevant but unpalatable cannot be “uninvented” or buried – FoI, GIPAs, subpoenas, discovery and even the media will find out what you knew or should have known

Case studies 1 and 2

- Scenario
 - DA for residential development
 - land likely to be subject to flooding under some cc forecasts
 - No government policy
 - Council has refused consent
 - Appeal lodged in Court by developer
- Discussion
- Scenario
 - LEP rezoning to make more land available for residential use
 - Community divided, has been on the agenda for years
 - Proponents and objectors have multiple scientific opinions
 - Possible requirement for transportable housing & other creative solutions
- Discussion

3 risk reduction tools ... and 2 useful things from NSW

- 1. Knowledge (current, relevant, reliable)
- 2. Courage (to make hard decisions)
- 3. Fortifications (to repel the inevitably unhappy)
- Section 733 – a good model
- The *Beatty Legal/ Sea Change Taskforce* Project

Q and A



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