



AUSTRALIAN LOCAL  
GOVERNMENT ASSOCIATION

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Barriers to Effective Climate Change Adaptation  
Productivity Commission  
LB2 Collins Street East  
MELBOURNE VIC 3003

Thank you for the opportunity to make this submission to the *Draft Report on Barriers to Effective Climate Change Adaptation*. The Australian Local Government Association (ALGA) congratulates the Productivity Commission on the preparation of the Draft Report on this complex issue.

ALGA is a federated body of the state and territory local government associations, representing over 560 local government authorities across the country. ALGA has a long-standing relationship with the Productivity Commission and looks forward to the final outcomes of this Inquiry. This submission should be read in conjunction with state and territory local government association submissions, and other local government submissions that can provide more specific comments on the discussion papers and questions contained in it.

### **General comments**

Adaptation to climate change is a high priority for local government. The Productivity Commission correctly notes that local governments are established by state and territory legislation and have various responsibilities conferred on them through state and territory laws. For this reason, ALGA believes that it is essential that state and territory frameworks to address climate change are developed in consultation with local government, and take full account of local government concerns at jurisdictional level. Having said this, it is also important to note that there are national matters, including areas of Commonwealth responsibility, that are directly relevant to local government including measures to achieve national consistency; policy alignment; cross border matters; provision of information; capacity building and funding support to local governments and their communities to facilitate local and regional adaptation. Accordingly it is important that the Commonwealth work closely with local government on adaptation to climate change.

While all areas of the Draft Report are of direct interest to local governments, ALGA is pleased that the Report devoted a chapter to local government matters. This chapter provides an excellent overview of the critical issues facing the local governments. In the opening section of the Draft Report a range of potential barriers to managing risks are cited including:

- poorly defined roles and responsibilities for adaptation;
- local government capacity constraints, including financial constraints, lack of information and guidance, and skill shortages; and
- legal liability concerns of local governments.

ALGA agrees that this list accurately reflects the major concerns of local government that have been drawn to our attention by state and territory local government associations and councils.

### **Roles and Responsibilities and Legal Liability**

Local government is concerned that lack of clarity on roles and responsibilities in climate change adaptation causes confusion, inefficient decision-making and misallocation of resources.

ALGA supports in-principle Draft Recommendation 7.1

There is uncertainty about the roles and responsibilities for adaptation by local governments, including in the areas of land use planning, coastal management, and emergency management. As a first step to clarifying these roles and responsibilities, state and Northern Territory governments should publish a comprehensive list of laws which delegate regulatory roles to local governments. This would assist state, territory and local governments to assess whether local governments have the capacity to effectively discharge their roles.

ALGA agrees that uncertainty about the roles and responsibilities for adaptation by local governments, including in the areas of land-use planning, coastal management, and emergency management is a barrier to adaptation. In this regard, the identification of the roles assigned to local government authorities by state or territory legislation is a useful starting point, provided that it is complemented by an assessment of and commitment to ensure that local governments have the capacity to effectively discharge their roles.

ALGA also notes that the roles and responsibilities of local government in adaptation will not necessarily be codified in legislation and further work will be required to develop clarity in this area. There is now a body of tort law being accumulated in regard to climate change adaptation which will provide further insight into the roles and responsibility of the different levels of government.

In addition to meeting the obligations placed upon local government authorities by state or territory government, there is some concern about the capacity of local governments to adequately manage risks to their own assets given their current financial circumstances. In this regard ALGA believes that there is a need for further work to be done on risk assessment and risk management methodologies that are suitable for local government. Feedback suggests national methodologies for risk assessment and risk management are currently seen as too complex and onerous. Further, having identified risks and risk management strategies councils are frequently concerned about the risks that councils may be exposed to in the absence of Commonwealth or state/territory support including funding.

ALGA supports recommendation 7.2 but believes that it should be strengthened to not only request clarification of legal liability of councils but to ensure that councils are given adequate protection against legal actions brought against them.

#### Recommendation 7.2

'Uncertainty about the legal liability of local governments is emerging as a barrier to effective climate change adaptation. State and Northern Territory governments should clarify the legal liability of local governments regarding climate change adaptation matters and the processes required to manage that liability.

ALGA in partnership with the Department of Climate Change and Energy Efficiency commissioned Baker & McKenzie to prepare a report on *Local Government Risk of legal liability in the Face of Climate Change – Resolving Uncertainties* (July 2011). This is an excellent report that highlights the need to limit the liability of council, and proposes that to mitigate the risk of a claim against councils, other jurisdictions should enact exemptions provisions similar to s 733 of the *local government Act 1993 (NSW)*. For a full discussion of this issue this report is at: <http://www.alga.asn.au/site/misc/alga/downloads/environment/ALGA%20Consolidated%20Report-v7B-1392955-SYDDMS%20-%20Final.pdf>

On the basis of this advice ALGA believes that this is an important starting point for all jurisdictions to consider.

Identifying the roles and responsibilities of local government authorities does not necessarily address the capacity to exercise them. The Baker & McKenzie Report also discusses a strategy to support local government decision making functions, recognising the challenges councils have in keeping up to date with relevant information. Details can be found at page 10 of the Report. "In order to mitigate liability, Councils must ensure they keep up to date with general climate change science and information related to mitigation and adaptation strategies and also information particular to their specific local government area. This is because Courts will tend to take into account the latest science, for example from the CSIRO or reports by the Bureau of Meteorology. Councils will require localised information on impacts on which they can rely when making planning decisions and specialist advice on planning and engineering options for other aspects of adaptation. Clear and certain criteria for decision-making should be developed to increase public confidence that decisions are made on the basis of the best available scientific evidence. This could involve an expanded role for a centralised advisory body to collect and disseminate information and provide assistance and input, where appropriate, to aid Councils in assessing impacts and risks, including advice regarding the appropriateness of particular developments or conditions which could be included in development approvals. As uncertainty regarding climate science and climate change impacts is resolved over time, policy or guidance material used by councils should be adjusted to reflect current knowledge."

ALGA notes that on 4 May 2012 the Select Council of Climate Change released *Role and Responsibilities for Climate Change Adaptation in Australia* for community discussion.<sup>1</sup> The release of this paper is timely given that the Productivity

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<sup>1</sup> <http://www.climatechange.gov.au/en/government/initiatives/sccc/roles-and-responsibilities.aspx>

Commission work on this Inquiry is not completed. It may be useful for the Productivity Commission's Draft Report to take account of the Select Council's work. The Productivity Commission may also like to make comment on these roles and responsibilities taking into account the strong view on local government's capacity constraints, including financial constraints, lack of information and guidance, and skill shortages that are documented in the Draft Report.

### **Capacity constraints, including financial constraints, lack of information and guidance, and skill shortages**

ALGA believes that these issues are appropriately discussed in the Draft Report and supports the need for substantial collaborative work between all levels government and the community to address these issues.

The Productivity Commission includes an information request on hazard risk information asking:

'How useful are property title documents, property certificates, rates notices and rental contracts as means for communicating natural hazard risk information to households and businesses? What alternatives are available? What costs and risks would state and local governments incur in providing such information?'

Communications of hazard risk information is an important component of community education which will facilitate improved adaptation efforts particularly by property owners. However, there are 2 key issues that need to be considered if the provision of specific property information is to be advocated. These are:

- 1 whether property information is available and sufficiently valid and reliable to 'be useful' to property owners; and
- 2 whether the information can be provided without establishing a legal liability for the provider of the information, or more particularly from a local government perspective, a 'council' if they provide this information and whether there is an adequate (and affordable) legal defence if required.

ALGA understands that there is already an obligation in some jurisdictions to provide some property information. Baker and McKenzie discusses the potential risk of actions of 'negligence' being brought against councils for (a) failing to provide information, and (b) providing incorrect information. This is an onerous responsibility for councils that may not have the capacity to research all the relevant information pertaining to a property. Further it begs the questions as to whether the information can be relied upon and whether it is valid and up to date. ALGA questions the usefulness of information to property owners if the information cannot be relied upon, is incomplete or incorrect.

This gives rise to local government's primary concern about legal liability and to the question of whether a council which acts in good faith (e.g. in the provision of information) is exposed to legal risk.<sup>2</sup> The Baker McKenzie work demonstrates a direct link between the provision of information (and omission of information) and

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<sup>2</sup> Legal risk in this context includes the risk of payment of compensation, remedies and / or high legal and associated costs with litigation.

legal liability of councils. In the case of NSW, Councils are not liable for advice, acts or omissions (in good faith) relating to the provision of information with respect to climate change and sea level rise (*Local Government Act 1993 (NSW) s 733(3)(f5)*). This is not the case in all jurisdictions.

ALGA does not support the provision of property information on legal documents where councils are either expected to provide the information and / or 'validate' the information that could be used by the court. Councils do not generally have the resources and expertise to: a) gather all relevant information; b) ascertain the veracity of the information or c) up-date the information.

There may however be a case for the provision of general information that increases awareness and knowledge of general risks associated with climate change. As improved data and information becomes available on specific locations property owners can make their own informed assessments of risks.

### **Other issues**

Draft recommendation 4.1:

Reforms to address barriers to effective risk management in the current climate should be implemented without delay, where they are likely to deliver net benefits.

In relation to barriers to adaptation to uncertain future climate trends, the case is less clear.

- Where a reform has low up-front costs and potentially large benefits, albeit with long time periods between the costs being incurred and the benefits being received, there could be a case for preparatory action. The case is likely to be stronger if the reform will deliver benefits under a range of climate change scenarios.
- Where measures have high up-front costs, the community is likely to benefit by deferring high cost options until better information becomes available.

Nationally local government owns and manages approximately \$300 billion in assets of which \$180 billion are land and fixed assets, and as such councils have a material interest in assessing the impacted upon by climate change on these assets as well as developing an appropriate investment strategy to be able to adapt to climate change over time.

Local government acknowledges the need for an appropriate economic assessment of the costs and benefits of investing in infrastructure and work associated with climate change adaptation, but we remain concerned about the ability of cost benefit methodologies to adequately account for all relevant externalities, benefits and the political nature of decisions that impact on the community. Local government strongly recognises that decisions by councils to undertake an action or to postpone an action can have considerable consequence including impacts on property rights. Where this occurs it is often associated with complex legal implications that are not easy to anticipate not fully quantify /cost.

The Productivity Commission provides an useful discussion of investment principles when adapting to future climate trends which are uncertain and discusses the 'real options' approach, but further elaboration on the practical implications of such an approach is required.

Thank you for the opportunity to make this submission. I wish the Productivity Commission well in making its report on this important issue.

Yours sincerely

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