

NATURAL DISASTER FUNDING – PRODUCTIVITY COMMISSION INQUIRY

1. Beatty Legal welcomes the opportunity to make a submission on the extent to which current arrangements provide for effective natural disaster risk management.
2. Beatty Legal is a small, specialist law firm based in Sydney. We have particular expertise in advising on legal issues associated with climate related adaption in Australia. We have worked closely over many years with all levels of government and in particular local Councils.
3. This submission is informed by insights we have gained through instructions to provide advice on climate change adaptation and in preparing, facilitating, participating in, and presenting at, climate change workshops and seminars for local Councils throughout Australia. Through this work we have developed an appreciation of how key adaptation-related decisions are made (and not made) on the ground.
4. The current debate on disaster mitigation does not seem to appreciate the critical role played by elected Councillors who are the ultimate decision makers on the implementation of many adaptation and disaster mitigation strategies at the local level. Good information and resources are of little utility if Councillors are not properly motivated to make the long term, often expensive and politically contentious decisions necessary for effective adaptation and disaster mitigation. The current decision making environment for these collegiate bodies often favours delay and inaction.
5. Local government is at the forefront of managing risks associated with bushfires, extreme weather events and other natural disasters. This is because local government is usually responsible for determining what can be built, where and how, and for providing local access roads and ensuring adequate local water and stormwater infrastructure is available (in urban areas).
6. Councils are governed by State law. They are required to adjust to changes in State policies (and politics) while remaining responsive to, and reflective of community interests. These local interests may involve pressures to re-develop, develop (or not) in potentially vulnerable areas or concerns about how the release of information on risk could affect property values or insurance premiums.
7. Many Councils now have far more information about risks than was the case in the past. It is likely that information will continue to become more reliable and specific to local areas. This information enables Council staff to identify and develop detailed disaster risk management strategies in the form of proposed land use planning policies or specific mitigation measures. However, in our view, deficiencies in information and resources are not necessarily the reason why some Councils fail to act promptly and decisively to manage the risks associated with possible natural disasters.

8. Decision making can be affected (or paralysed) by many factors, but in our experience the following factors inhibit many Councils from determining to implement risk mitigation policies and measures:
 - a. perceived risks of litigation;
 - b. perceived uncertainties in the reliability of information or the underlying causes of extreme weather events and the like; and
 - c. lack of long term certainty in the policy framework which regulates Council communications about risk.

Perceived risks of litigation

9. An increasingly important concern for Councils is the perceived risk (and rising cost) of litigation, either in the form of planning tribunal appeals or the larger and more serious risk of tortious action.
10. In NSW, section 733 of the *Local Government Act 1993* (NSW) provides local Councils with an indemnity from liability in respect of specified categories of advice provided or actions undertaken by Council relating to flood liable land, land subject to bushfire and land in a coastal zone. To obtain the benefit of this indemnity, Councils must be able to demonstrate that the advice or action in question was undertaken in good faith. In this context, the concept of "good faith" includes demonstrating that Council reasonably and had regard to current, reliable information on relevant risks.
11. This provision gives Councils in NSW a real degree of protection from judgments against them in negligence if they act in good faith and rely on up to date information. It thus encourages Councils to make decisions on disaster risk mitigation issues in the first place as well as discouraging frivolous actions against them.
12. The decision making environment of Councils in other Australian jurisdictions would be improved if similar provisions were enacted there. Federal disaster relief funding and or funding of State infrastructure projects could potentially be tied, to some degree, to adoption and implementation of "733-like" reforms by the States and Territories in their respective Local Government or Planning Acts. It may also be appropriate to require some empirical evidence of decision making which results in fewer approvals of inappropriate development or inappropriate design in vulnerable areas.

Risk Identification

13. Uncertainties and confusion about the reliability and scope of information on risks associated with natural hazards frequently derail the decision making process. Risk information is provided to Councils from a range of government and private sources. The quality and reliability of this information varies and its credibility is often predicated upon a detailed understanding of the assumptions behind the information and the purpose for which the risk assessment was prepared. Councils frequently do not have the expertise or resources to sift through the available information or to verify that the information provided is from a reliable source, fit for purpose and up to date.
14. If appropriate fine-grained risk information, prepared in accordance with nationally accepted standards, were to be made available through a centralized source or Federal scientific clearing house, this would ensure that Councils, consultants, insurers and banks would confidently be able to access consistent and reliable information. Assuming relevant intellectual property impediments could be overcome, this may also provide a national forum for the pooling and sharing of information.

15. Information about risks can never be complete or certain. However, if there is general agreement on the reliability of the source of the information and the limitations of that information, informed and more cost effective decision making can take place.
16. The availability of better, consistent and nationally accepted information on risks associated with natural hazards would allow affected parties and the community to have a more mature discussion about those risks and risk mitigation. It would also reduce the likelihood of perceived uncertainties about the reliability of risk information derailing Council decision making.

Risk Communication

17. The decision making environment for Councils would also be improved if State and Federal governments took a leadership role in communicating natural hazard risks and the responsibilities of Councils in relation to communicating those risks were better defined.
18. For instance, in some jurisdictions Councils are required to provide information on flood risk on planning and property certificates. However, there is inconsistency between the jurisdictions as to what information is required and the application of regulatory/policy requirements by Councils within each jurisdiction varies.
19. More reliable and credible sources of information and greater consistency in the timely and efficient communication of risks to, for instance, property owners and insurers, would help create an environment which encouraged market based risk allocation. It would also educate the community so as to enable a mature discussion about risks and risk allocation, and the appropriate funding and prioritization of risk mitigation works

Recommendations

20. Critical decision making concerning the mitigation of hazards would be improved if:
 - a. Councils in all Australian jurisdictions were afforded clear statutory protection from liability for decisions on these risk issues made in good faith and in reliance on the best available information;
 - b. a central and well funded source of reliable risk information was prepared and maintained in accordance with nationally accepted standards; and
 - c. Councils were provided with a clear (nationally) consistent policy framework with respect to natural hazard risk communication.