

Enhancing Procedural Regard and Ameliorating Climate Legal Risk: A Decision-Making Framework for Local Governments' Adaptation Decisions

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Abstract.

Local government decisions concerning climate change adaptation are frequently fraught with both legal and factual uncertainty, and concerns about litigation risk may lead to inertia or maladaptive decision making. These issues often result in policy and decision making paralysis. This paper proposes that a framework for procedural regard provides valuable guidance for decision makers seeking to enhance their decision-making practices in relation to climate change adaptation. This framework synthesises insights from regulatory theory and administrative law, and argues that procedural regard occurs when: (1) decision making is legally and procedurally constrained; and (2) decision makers take into account affected interests.

In the light of a series of successful climate litigation cases in Australia, there is strong demand from local government decision makers for guidance on minimising litigation risk in relation to climate change adaptation. In order to provide concrete guidance for decision makers, the abovementioned framework for procedural regard needs to be translated into a user-friendly decision-making methodology. This paper argues that, first, in order to achieve legally and procedurally-constrained decision making, in accordance with the first limb of the procedural regard framework, decision makers need to consider the source and scope of their decision-making power, and the legal certainty of the decision before them. Secondly, in order to promote due regard for affected interests, including environmental interests, in accordance with the second limb of the procedural regard framework, decision makers need to reflect upon the factual certainty of the issues before them.

This two-step decision-making methodology thus translates the theoretically-informed framework for procedural regard into guidance that is clear and accessible to non-lawyers. This paper posits that following this decision-making methodology will enhance the quality of local government decision making in relation to climate change adaptation. Two potential advantages include positive adaptive responses to future climate change, and ameliorating decision-makers' liability risk.

Keywords: adaptation, climate litigation, decision making, procedural regard.

BIOGRAPHY

Anna Huggins is a Senior Lecturer in the QUT Faculty of Law, and is the co-director of the International Law and Global Governance research program. Her research explores how insights from administrative law and regulatory theory can be used to evaluate and enhance decision-making processes in climate and environmental governance. Her recent work examines the desirability of proceduralisation in the compliance regimes of multilateral environmental agreements, reflecting inter-disciplinary engagement with scholarship on international environmental law and global administrative law. Anna previously worked at UNSW Law and the NSW Department of Environment and Climate Change.

Mark Baker-Jones is a partner in the Property & Projects group and a member of the Property and Energy industry groups in the national law firm DibbsBarker. Mark has a multi-jurisdictional knowledge of the law as it relates to the built and natural environment, making him one of Australia's principal planning and environment lawyers. Mark has a particularly strong focus on climate change law, including legal and institutional frameworks that facilitate climate change adaptation, where he assists clients in relation to managing climate legal risks and liabilities. He is a recognised leader in this field and has a broad understanding of the regulatory, institutional and governance frameworks in relation to climate change.

Melanie Baker-Jones is currently undertaking a PhD at Queensland University of Technology full-time within the Faculty of Law. The thesis will provide operationally relevant conclusions for those agencies involved with Emergency and Disaster Management. Her thesis will undertake a legal risk assessment for government and Emergency service agencies that utilise social media during an emergency or disaster. In addressing tort liability, in particular actions based around negligence, statutory duties and negligent misstatement, the aim is to identify intolerable risks which might arise and recommend protocols to mitigate these risks. Melanie's thesis incorporates elements of risk management, policy, differential understandings of moral and legal obligations and integrates her knowledge gained from degrees in both Sociology and Law.

Donovan Burton is the principle of Climate Planning and has extensive experience in sharing insights on adaptation. From policy creation and keynote presentations through to establishment of governance and disclosure systems Donovan has influenced adaptation planning in Korea, Vietnam, Thailand, USA, Fiji, Samoa, Kiribati, Vanuatu, New Caledonia, Marshall Islands, New Zealand and throughout Australia.

Donovan has applied experience with insurers, developers, corporations, UN agencies, research organizations and all levels of government. This experience, combined with his meaningful storytelling has seen a recent surge in demand for speaking engagements around the world.