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Climate Adaptation for **Decision-makers**

Legal tools for adaptation

Policy Brief

Contributors

Rachel Anne Carter, Lee Godden, John Handmer, Jacqueline Peel, Francine Rochford, Jude Wallace, Lisa Caripis, Tim Baxter, Annette Wiltshire

The VCCCAR funded project, Governance Models for Adaptation and Natural Disaster Risk Management, is investigating Victorian legal, financial and institutional frameworks for managing the risks of extreme events and natural disasters.

It will identify specific risk management mechanisms in land use planning, catchment management, natural resource management and infrastructure development and make recommendations for incorporating decision-making under the uncertainty introduced by climate risk. The project has worked closely with government partners to identify options for knowledge transfer to support decision-making through accessible practitioner and policy related publications.

Key points

- The law provides individuals, businesses and governments with a range of tools and mechanisms to manage risks posed by climate change, including tools that reduce vulnerability and increase resilience to extreme weather events.
- Strategic planning and policy development in response to climate change challenges can be assisted by fostering an improved understanding of the ways in which different aspects of law can shape behaviour.
- The effectiveness of community, business and government responses to climate change can be influenced by the design of legal tools and mechanisms. These may enable, hinder or shape adaptation measures.

Climate change impacts

While Victoria has always experienced extreme weather, the severity and frequency of climate events such as floods, bushfires, heatwaves and drought are increasing due to climate change.¹ Exposure and sensitivity to climate events is on the rise with an increasing and ageing population and an increase in urbanisation. Climate change also introduces new hazards and risks such as coastal inundation from sea level rise and storm surges.

Part of the adaptation challenge therefore involves reducing the exposure and vulnerability of the community, business and government sectors to these extreme events.

The role of legal tools in responding to climate risks

Climate change will require individuals, businesses and governments to adapt to, prepare for and manage the risks of extreme events. The ability to do this is affected by the law: legal standards, powers, rules and agreements.

Adaptation to climate change is often understood as a matter of risk management.²

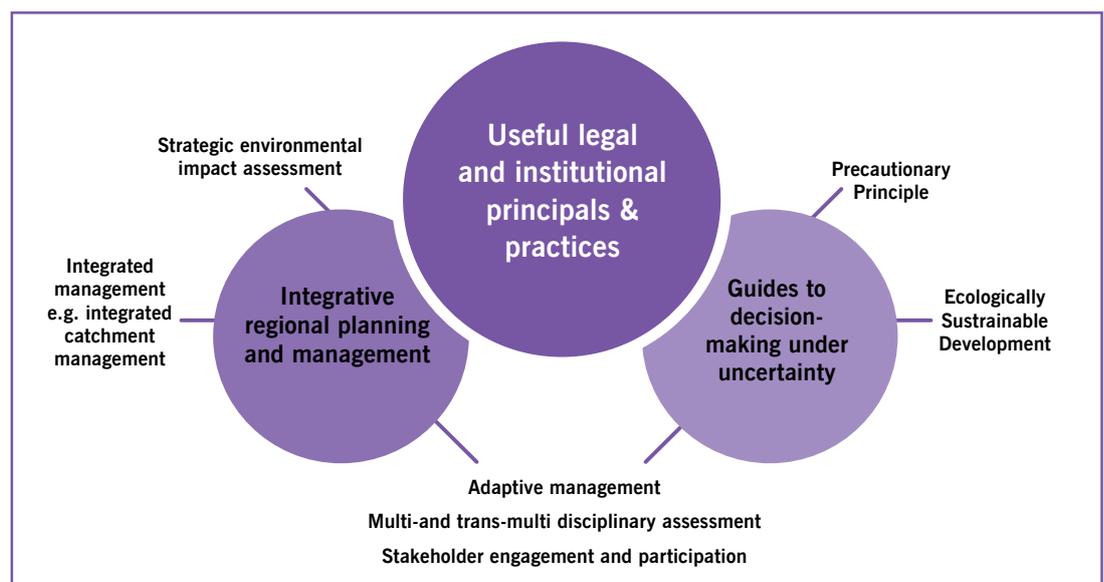
The law offers different tools for dealing with risks:

- various concepts that deal with the formulation and assignment of risk between parties are embedded within legal frameworks (through contracts, for example) and concepts of causation in relation to hazardous events (such as in the tort of negligence)
- measures that seek to deal with risk proactively (such as instruments for strategic planning law or environmental impact assessment requirements)
- principles and practices that can be used to guide decision making in conditions of uncertainty and facilitate integrated management and strategic planning processes (Figure 1).

There are multifaceted challenges for formulating and implementing adaptation responses. There is scientific uncertainty about the manner in which climate change will affect the risks associated with extreme weather events. There are also complexities about the consequences and impacts of extreme events. Further risks are created by context-specific impacts, where the nature of impacts of extreme events varies due to different locations

Figure 1 Principles and practices to deal with uncertainty and complexity.

Examples of legal tools that can be used to guide decision-making in conditions of uncertainty and facilitate integrated management and strategic planning processes.



¹ Climate Commission, *The Critical Decade: Extreme Weather* (2013), p 8.

² Victorian Government, *Victorian Climate Change Adaptation Plan* (2012), p 9.

and different timescales. The severity of impacts also varies depending on the vulnerability of affected communities. Table 1 demonstrates how legal tools can be used to address these types of challenges.

Relevance for policymakers

Laws shape and control behaviour to achieve certain outcomes. They promote particular values, principles and goals, and set standards

and requirements for behaviour and action. In this sense, various types of law may facilitate and enable – or conversely hinder – efforts to manage the risks associated with climate change impacts.

Given the constraints that different laws have on behaviour and on the ability of an entity to manage risks, it is important for policymakers to understand the existing laws and arrangements in place that may constrain or affect adaptation-related policy goals in a given setting.

Table 1: Climate adaptation challenges and the benefits of legal tools

Challenges	Benefits of legal tools
Uncertainty and complexity	<ul style="list-style-type: none"> • provide information about extreme events • ensure risks are accounted for in decision-making • provide flexibility and guidance in decision-making to account for uncertainty setting up legally binding strategic planning processes allocating the burden of risk of certain events
Context specific impacts	<ul style="list-style-type: none"> • create a framework for integrated and holistic decision-making enabling roles and responsibilities for managing risks to be defined and legally binding
Unevenly distributed impacts	<ul style="list-style-type: none"> • create opportunities for community participation • help to ensure the distributional effects of decisions are transparent and fair.

An understanding of the law can assist when:

Developing policy

- When public bodies take on adaptation-related responsibilities, it is helpful to understand the suite of statutory obligations and duties by which they are bound. For example, water storage managers are bound by the terms of their bulk entitlement orders which restrict them from releasing water from storage. This means that the expectation that they will ‘develop and implement strategies to mitigate flooding, where possible’, as required under the Water Act 1989, by releasing water, for example, needs to recognise the effect of this potentially conflicting duty.

Implementing policy

- An understanding of what the law expects is a reasonable and responsible way to undertake climate risk mitigation activities or communicate information about the impacts of climate change, to ensure that legal risks and liability are avoided and give entities confidence in their efforts to adapt to climate change.

Reviewing policy

- In the event of a change in policy position by government (e.g. privatisation of public assets), legislation or legislative amendments may be considered to require port managers to assess and manage risks created by extreme weather, so there is a consistent approach between privately and publicly operated ports.

Which legal tools are available and how can they help?

Legal tools range in form and function. Some are expressly tailored to the purpose of adaptation but most have general application. Table 2 provides an overview of the different areas of law, the types of legal tools they offer and how they can be used to manage climate risks and help adaptation efforts by governments, business and individuals.

Governance Models for Adaptation and Natural Disaster Risk Management project will develop a legal toolkit for policy makers to provide guidance on the different legal tools available, what functions they can perform and how to determine their suitability for use in particular policy settings (considering matters such as cost, flexibility and certainty).

Table 2: Legal tools to assist decision-makers in responding to climate change

Type of legal tool	Details	Examples
Legislation (Acts, regulations and delegated legislation)	<p>targeted legislation setting up a framework for climate change adaptation</p> <p>legal tools specifically requiring consideration of climate change impacts</p> <p>legal tools related to matters that will be directly impacted by climate change (e.g. managing the risks of extreme events)</p>	<ul style="list-style-type: none"> • <i>Climate Change Act 2010, Parts 2 and 3</i> • <i>Climate Change Act 2010, s 14</i> • Planning instruments contained in Victorian Planning Provisions (VPP) cl 13.01 • VPP 13.02-1 Floodplain management • Amendment of the Part 6 of the <i>Terrorism (Community Protection) Act 2003</i> to embed an 'all hazards' approach to critical infrastructure resilience
Judge-made law³	<p>allocating risks and responsibility</p> <p>setting out guiding principles</p> <p>incorporating scientific information</p>	<ul style="list-style-type: none"> • negligence law (what risks should those taking action consider?) • contract (how are risks assigned between parties e.g. in construction and insurance contracts?)
Information-based tools	<p>may be mandated by law</p> <p>designed to inform consumer behaviour or improve transparency around government decisions</p>	<ul style="list-style-type: none"> • vendor disclosure requirements for the sale of properties in bushfire prone areas: <i>Sale of Land Act 1962 (Vic) s 32</i>
Market and financial mechanisms	<p>mandated by law or given legal backing</p> <p>provide a flexible, and incentive oriented approach to regulation</p>	<ul style="list-style-type: none"> • <i>Ecotender</i>- a voluntary, market-based scheme that creates incentives for landholders to manage and conserve native vegetation on their properties
Voluntary schemes	<p>framework for these schemes is generally provided for by law</p>	<ul style="list-style-type: none"> • Sustainability Covenants under the <i>Environment Protection Act 1970 (Vic)</i>
Community participation tools	<p>may be mandated by law</p> <p>to build community resilience</p> <p>to enhance transparency around government decisions</p>	<ul style="list-style-type: none"> • <i>Victorian Adaptation Sustainability Partnership</i> - to support councils to work with their communities to become more sustainable and resilient to climate change.

¹ This area of law is sometimes called the 'common law'. This term also refers to the type of legal system in Australia. See, Christine Parker et al, 'Introduction' in Christie Parker et al (eds) *Regulating Law* (Oxford University Press 2004).

The research project

This policy brief summarises findings from the report *Legal Tools and Measures for Adaptation and Managing Climate Risk in Victoria*, prepared under the VCCCAR-funded project, *Governance models for adaptation and natural disaster risk management: legal, regulatory, institutional and financial assessment*. The report focuses on the legal arrangements that shape climate change adaptation in Victoria. It provides an overview of the ways in which different legal measures and tools work and their general relevance for adaptation and efforts to respond to climate risks. The report follows the project's first report, *Governance Arrangements for Climate Change Adaptation and Natural Disaster Risk Management in Victoria*. Both reports can be found on the VCCCAR website, www.vcccar.org.au.

The project commenced in May 2012 and was designed to produce policy-relevant research for the Victorian Government about the role of law and institutions in adaptation to extreme events. The project identifies and analyses the legal and policy instruments available to reduce vulnerability and exposure to extreme weather and climate events. This project will also provide a guidance document for policy-makers on the range of legal tools and instruments available and their suitability for achieving different policy outcomes.

Both reports completed to date were prepared in consultation with representatives from the Victorian Government involved in planning, transport, emergency management and climate change policy. Technical papers are being developed to examine the following:

- 1) land-use/spatial planning: legal tools and mechanisms for adaptation
- 2) dealing with uncertainty and risk management; legal, information and insurance issues
- 3) governance and legal issues for ports infrastructure adaptation to climate change.

The project research team includes:

Professor Lee Godden – Melbourne Law School, University of Melbourne

Rachel Carter – Deakin School of Law, Deakin University

Professor Jacqueline Peel – Melbourne Law School, University of Melbourne

Professor John Handmer – Centre for Risk and Community Safety, RMIT

Dr Francine Rochford – La Trobe Law School, La Trobe University

Jude Wallace – Centre for Spatial Data Infrastructures & Land Administration School of Engineering, University of Melbourne

Lisa Caripis – Research Fellow and Project Manager, University of Melbourne

Tim Baxter – Researcher, University of Melbourne

Annette Wiltshire – Research Fellow and Project Manager, University of Melbourne

Victorian Centre for Climate Change
Adaptation Research

University of Melbourne
221 Bouverie Street,
Carlton, Victoria, 3010
enquiries-vcccar@unimelb.edu.au
+ 61 (03) 8344 3095
www.vcccar.org.au



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