

## ClimateIndex™ - Frequently Asked Questions

In February 2024, The Law Society of New South Wales published its practitioner guidance on climate change. In it, they suggest that there is an evolving duty of care owed by solicitors to their clients to provide advice regarding climate change issues and related consequences in any legal matter.

In May 2023, Norton Rose Fulbright published their legal opinion *'Do Real Estate Lawyers in NSW Owe Their Clients a Duty of Care to Advise and Warn in Relation to Climate Risk?'* in which they concluded that lawyers will have a duty of care to advise and warn their clients about climate risks, and that this duty has been in place since around 2021.

In June 2023, Groundsure launched ClimateIndex™, a due diligence report for the legal profession to aid in the identification of key physical risks driven by climate change that could impact properties in New South Wales.

### Data and methodology

What are the sources of data used for the reports?

Physical risk	Dataset	Source
Flooding	Floodmap	Ambiental Risk Analytics
	Flood defences	
	FloodScore	
Bushfire	Bushfire Prone Land (BFPL)	NSW Rural Fire Service
	Forest Fire Danger Index (FFDI)	The Commonwealth Scientific and Industrial Research Organisation (CSIRO)
	Lightning	NASA via Global Hydrometeorology Resource Center (GHRC)
	Elevation	Geoscience Australia
	Urban Landscapes	
	Fire History / Prescribed burns	NSW National Parks and Wildlife Service / Department of Planning and Environment
	Fire Extent and Severity Mapping (FESM)	NSW Department of Planning and Environment / NSW Rural Fire Service
Coastal erosion	Historic Coastline	Digital Earth Australia
	Historic erosion	

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	Smartline, Shoreline Fabric & Form, Geomorphology	Geoscience Australia
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ClimatIndex™ covers three key physical perils: flooding, bushfire and coastal erosion. Each peril will be presented using a 7 tier scale (Very Low, Low, Low to Moderate, Moderate, Moderate to High, High and Very High).

Each peril will show the risk for today, in 5 and in 30 years time taking into account the effects of climate change.

An overall ClimatIndex score will be on a scale of A to F, based on the cumulative combined risks of the three perils.

ClimatIndex score	Overall perils rating
A	Very Low & Low
B	Low - Moderate
C	Moderate
D	Moderate - High
E	High
F	Very High

For example:

Peril	Individual scores			Overall score		
	Today	5 years	30 years	Today	5 years	30 years
<b>Flooding</b>	Low	Moderate	High	B	C	E
<b>Bushfire</b>	Low	Moderate	Moderate - High			
<b>Coastal erosion</b>	Low - Moderate	Moderate	Moderate - High			

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### How does the information get amalgamated and how does the predictive analysis work?

#### Flooding:

- The undefended flooding data has been sourced from Ambiantal Risk Analytics meeting a set criteria specified by Groundsure on likelihood (return periods) and severity (flood depths). The return periods used are 1 in 20, 1 in 100 and 1 in 500 year events in any given year. For example, a 1 in 100 year flood means each year there is a 1 in 100 chance of it happening, not that if a flood occurs, it will not occur again for 99 years.
- Additional data on flood defences has been implemented by Groundsure to mitigate against the presence of flooding where defences are present and data is available, based on likelihood (return period).
- Groundsure has also developed a proprietary calculator to provide an assessment to the whole lot from flooding.

#### Bushfire:

- Groundsure has developed a proprietary bushfire assessment calculator, utilising a variety of different data inputs not seen in other/existing bushfire risk assessments. This includes:
  - Bushfire prone land (BFPL)
  - Fire weather from the Forest Fire Danger Index (FFDI)
  - Fire history
  - Fire extent and Severity Mapping (FESM)
  - Urban landscapes and elevation
- To provide the 30 year assessment we have taken the Forest Fire Danger Index data, using decade based long term modelling up to 2096, taking a present day view at 2026 and a 30 year view at 2056.
- Additional datasets including bushfire prone land, historical lightning, historical fires and prescribed burns have been modelled on this same basis.

#### Coastal Erosion:

- Groundsure has developed a proprietary coastal erosion assessment calculator. This assessment is based on the projected time it will take for the coastline to reach the
- 
- property. The risk to the property is calculated by analysing multiple risk factors such as:
  - Distance to coastline
  - Historical erosion activity
  - Shoreline fabric

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- Shoreline form
- Weather
  
- To provide the 30 year assessment, historical erosion rates are extrapolated with consideration to the form and fabric of the shore to influence the impact from climate change. The assessment is based on the proximity to the modelled 30 year coastline.

### Overall:

- A proprietary overall assessment of risk will be provided in the form of a property specific ClimateIndex score (A to F); a summary indication of the risk presented by the included perils (flooding, bushfire and coastal erosion) both today and as impacted by climate change across the next 30 years

### What climate modelling/RCP is the report based on?

We have chosen to use RCP 8.5 or equivalent as this is commonly used by financial institutions across Australia. RCP 8.5 is a climate scenario where greenhouse gas emissions continue to grow without mitigation.

RCP 8.5 is a good baseline/stress test for properties and can easily determine if a property will be at risk of climate change in the future.

### ClimateIndex from Groundsure

#### What climate data information is available from Groundsure?

	Number of properties at risk*	
	Current	By 2050
Coastal erosion	10,788	13,450
Bushfire	892,469	927,298
River flooding	498,069	501,881
Surface water flooding	725,447	732,556
Coastal flooding	93,757	97,109

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\*at moderate risk or above

### What does Groundsure's ClimateIndex™ tell lawyers?

ClimateIndex™ is Groundsure's analysis of climate change risk data. ClimateIndex™ provides a property specific rating from A to F based on three core physical perils: flooding, bushfire and coastal erosion over 2 time periods: today and 30 years. We have chosen these time frames as 30 years is the assumed length of a mortgage.

ClimateIndex™ has been designed to ensure solicitors are climate compliance ready. It means that there is now a clear, practical and reasonable step which the solicitor can take to discharge their duty of care in respect of such risks.

Solicitors can now advise their clients on future risks which may not only cause physical damage to a property, but also give rise to transition effects, such as having a material impact on the ability to insure or mortgage the property in the medium to long term. In turn, this could affect its future resale value.

### How do I know if a climate search report is needed?

If ordering via one of our partners InfoTrack, an alert will flag when a climate search is required. This will be noted as "critical climate information".

### How much does ClimateIndex™ cost?

ClimateIndex from Groundsure costs \$39. The report is suitable for all types of property up to 100ha.

## A lawyers duty of care

### Would a lawyer breach their duty of care by not commissioning a specialist climate risk report if the seller has provided insufficient information?

Yes. [Norton Rose Fulbright](#) is of the view that many real estate lawyers are obliged to advise on climate risks and were potentially obliged to do so as early as 2021, when natural disasters first started being widely attributed to climate change by the media, government and the public.

They consider that specialist climate risk reports would greatly assist lawyers involved in real estate transactions to fulfil their obligations and minimise the risk of claims.

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Now that specialist climate risk reports are available as part of the conveyancing transaction, a lawyer who fails to order such a report (or at least seek instructions to do so), would be at risk of failing to discharge their duty of care they owe to their client.

### Do lawyers owe their clients a legal duty to warn about the adverse impacts of climate change on land and buildings?

In their [legal opinion](#), Norton Rose Fulbright concluded that in many circumstances, a lawyer will have a duty of care to advise and warn their clients about climate risks.

This duty is based on the tort of negligence and contract, as well as potentially the law of misleading or deceptive conduct, which is a statutory cause of action under the Australian Consumer Law (ACL) including sections 18 and 30 of Schedule 2 of the Competition and Consumer Act 2010.

The duty of care to advise clients on climate risks is especially likely to be the case where one or more of the following are true:

- It is obvious or well known that climate risks affect the property;
- The lawyer is aware that climate risks may affect their client's interests;
- The lawyer professes to be a specialist in environmental law;
- The client is vulnerable.

*"Providing clients with sound advice to solve a legal problem or dispute requires addressing not merely the legal issues but also the financial, the emotional and psychological, the relational and social, the environmental, and the ethical consequences of different courses of action. Clients can thereby understand the consequences, costs and uncertainties associated with alternative courses of action and make an informed choice. This holistic advice is given by lawyers to clients in many areas of the law on a daily basis. **Adding the climate change consequences as a consideration is a natural extension of this everyday practice.**" [emphasis added] Chief Judge Brian Preston of the NSW Land and Environment Court.*

### Where does the lawyers' retainer come in this - can lawyers exclude the provision of climate advice from their retainer?

A lawyer should be aware of climate risks and should, as part of their retainer, take steps to warn their clients and advise them on the steps they may wish to take to respond to the risk.

Lawyers can exclude climate advice from the retainer, but this would be a very unattractive course to take. By doing so, the lawyer may effectively protect themselves from liability under the law of contract, however, breach of contract is not the only potentially available cause of action, and claims under negligence and the ACL may still succeed.

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It is possible that a successful claim may still be made against a lawyer who fails to advise their client of the obvious implications of climate change, notwithstanding the fact that advising on such issues was excluded from the retainer.

The Australian High court has held that *“in certain circumstances, the tortious duty owed to a client might extend beyond the parameters of the retainer and require a solicitor to take positive steps to void a client sustaining any real and foreseeable economic loss.”* This is known as the penumbral duty of care.

A lawyer seeking to exclude advising on climate change from their retainer should still be aware of their obligations under the ACL.

In addition, excluding advice from the retainer will depend on several factors including the nature and sophistication of the client. I.e. The duty is higher for less sophisticated, more vulnerable clients.

See *PPK Willoughby Pty Ltd v Baird*

### What risks do lawyers take if they ignore their climate duty of care?

Failure by lawyers to follow reasonable steps to discharge their duty may increase their exposure to liability risks, including clients seeking damages for professional negligence, increased professional indemnity insurance premiums, and possible reputational damage.

## Discharging Your Duty of Care

### How should lawyers discharge their duty of care?

There are several steps a lawyer can take to discharge their duty but the most obvious is to obtain a report or tool which analyses risks which climate change presents to a particular property. This can now be done with Groundsure's ClimateIndex™ report.

It is considered that such a report would greatly assist lawyers to fulfil their obligations (under contract, negligence and the law of misleading or deceptive conduct) and minimise the risk of claims.

If a lawyer fails to discharge their duty of care, the Office of the NSW Legal Services Commissioner (OLSC) can pursue any breach by a lawyer under the Conduct Rules (Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015).



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By commissioning such a report would assist lawyers to:

- (1) Adapt their practices so that they take climate risks into account in a way which is meaningful and of direct relevance to their clients;
- (2) Protect clients from the inevitable financial implications of climate change;
- (3) Identify when they need to warn their clients of climate risks, and recommend they receive further advice; and
- (4) Ensure that any reports they provide to their clients or third parties are accurate and not misleading or deceptive.

### What is a lawyer supposed to do with climate data - other than simply to pass it to the client?

As reports and tools are now available which analyse the risks climate change presents to property, lawyers will now be in a position to provide more meaningful and timely advice to their clients, and should pass such reports or tools onto their client. However, the extent to which a lawyer is required to go further and provide advice on the implications of the report has two opposing views:

- (1) lawyers should not be compelled to provide opinions which they are not qualified to give, including in relation to the financial wisdom of a transaction; and
- (2) it is incumbent on a lawyer to advise their client of the obvious practical implications of the client's entry into the transaction that is the subject of advice.

The courts generally reconcile these two considerations by allowing lawyers to discharge their duty of care by bringing the potential issue to the clients attention and simply recommending they seek further advice from a specialist lawyer and/or other expert, such as Groundsure. See *Hatzitanos & Ors v Jordan*

### Should lawyers simply relay climate risk analysis to the client, or is it also necessary to explain it to the client and spell out any associated legal risks?

As per the above, if a lawyer is able to obtain a report which assess how climate change is likely to impact a property, it may not be necessary to summarise the findings of the report, particularly if it:

- (1) Is already in a digestible format and written in plain English; and
- (2) Discusses how climate change may impact the value, insurability and availability of finance and development potential of the property, and the kinds of further advice which it may be useful to obtain in relation to those impacts.

Where a report indicates a relatively high risk, it may be necessary for the lawyer to recommend, in strong terms, that their client seek further advice.



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**If lawyers fail to advise on climate risks, is there a possibility of being sued for negligence by a client who has suffered loss because climate change was not properly explained to them before signing the purchase contract?**

Yes. Failure by lawyers to follow reasonable steps to discharge their duty may increase their exposure to liability risks, including clients seeking damages for professional negligence, increased professional indemnity insurance premiums, and possible reputational damage.

