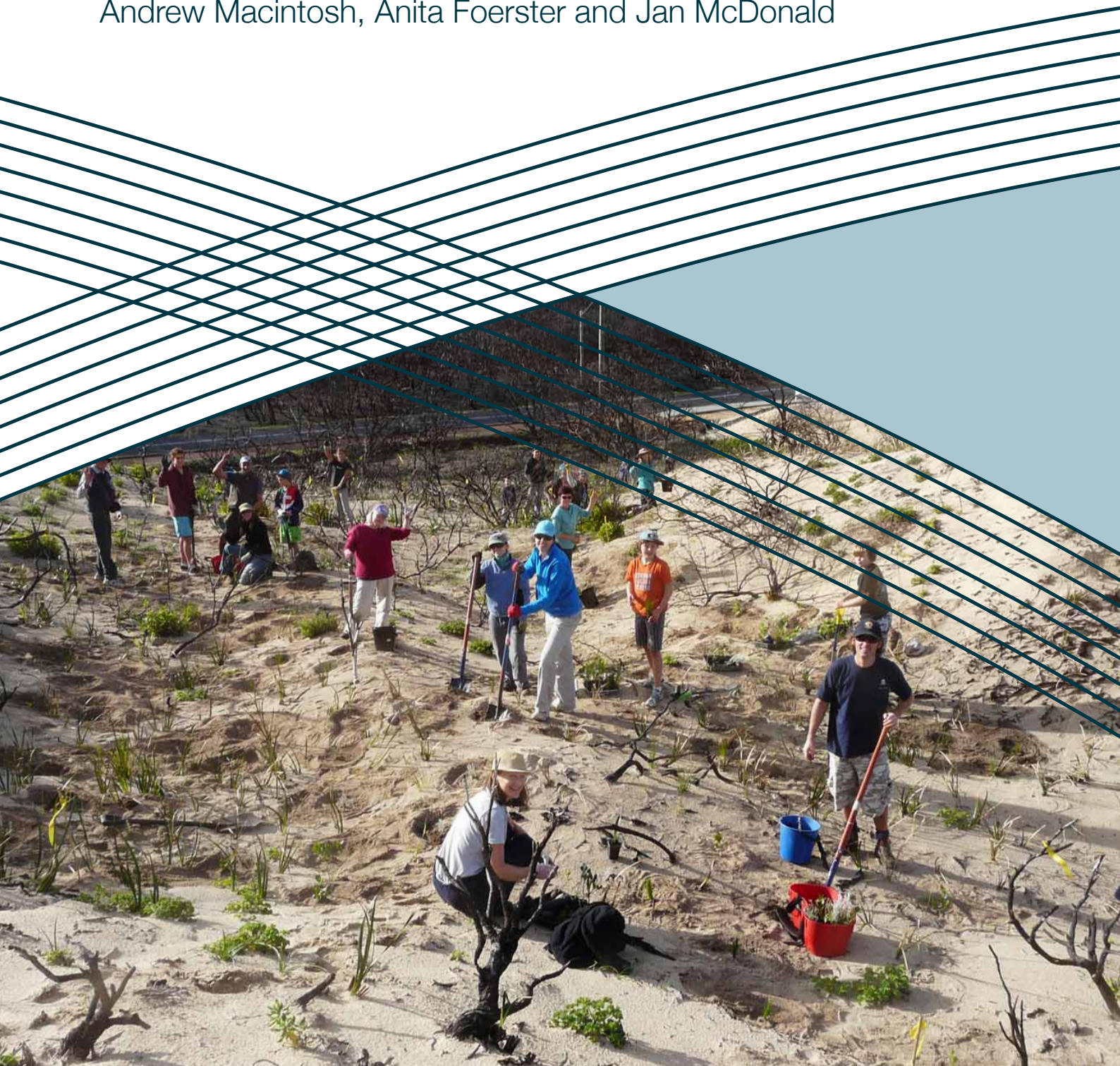


Limp, leap or learn?

Developing legal frameworks for climate change adaptation planning in Australia

Summary for policymakers

Andrew Macintosh, Anita Foerster and Jan McDonald



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AUTHORS

**ANDREW MACINTOSH
ANITA FOERSTER
JAN MCDONALD**



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The role of NCCARF is to lead the research community in a national interdisciplinary effort to generate the information needed by decision makers in government, business and in vulnerable sectors and communities to manage the risk of climate change impacts.

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Cover image Gnarabup community planting after bushfires © Blair Darvill, South West Catchment Council

Limp, Leap or Learn? Project Summary

Settlements in coastal and bushfire prone areas across Australia face major challenges in adapting to potential climate change impacts. There is a range of legal tools and instruments that can be used to influence the spatial distribution and nature of land use and development and hence the exposure and vulnerability of settlements to climate hazards. These include instruments which seek to control and influence new development (the traditional domain of land use planning) and those which specifically target existing development. This research project has developed a taxonomy of spatial planning instruments, classified according to the role they play within a legal framework for adaptation planning: for example, communicating information on climate hazards; regulating land use and development; or incentivising hazard mitigation activities. Drawing on extensive investigation of existing legal frameworks, and interviews with local and state planning, emergency management and coastal officers in selected coastal and bushfire prone areas across Australia, the project has identified potential benefits and challenges associated with different instruments and makes a number of recommendations regarding the way in which they can be employed to support effective and efficient adaptation to climate change.

Presented below is a short summary of each group of spatial planning instruments including key features, examples drawn from current Australian practice, advantages and challenges, and considerations and recommendations for implementation.

1. Framing Instruments

Framing instruments include objectives clauses in planning statutes; or objectives, principles and strategy clauses in state, regional and local planning policies. These are important umbrella instruments within legal frameworks for adaptation planning, used to articulate over-arching policy goals and objectives and outline how different regulatory and non-regulatory instruments can be used to achieve these objectives.

Examples: Current practice favours the use of state level planning policy within statutory planning frameworks, translated through to local planning instruments. E.g., Victoria - *State Planning Policy Framework – Clause 13 – Environmental Risks*; Queensland – *State Planning Policy for Coastal Protection 3/11* (under review); *State Planning Policy 1/03 Mitigating the Adverse Impacts of Flood, Bushfire and Land Slide* (under review); South Australia – *Coast Protection Board Policy Document* and corresponding standard objectives and principles in local Development Plans.

Advantages	Challenges	Implementation
<p>Important source of overarching direction and guidance for all decision-makers within complex governance arrangements.</p>	<p>Policy issues remain highly contested (esp. in a coastal context) in relation to:</p> <ul style="list-style-type: none"> - managing uncertainty; - roles and responsibilities; <p>and</p> <ul style="list-style-type: none"> - strategies for existing development. <p>This is reflected in poor use of framing instruments, particularly in a coastal context.</p>	<p>More effective use of available state level framing instruments to:</p> <ul style="list-style-type: none"> - express clear objectives and priorities; - outline how these objectives should be realised; and - clearly delineate roles and responsibilities, particularly between state and local government. <p>Ensure that high level policy statements in framing instruments translate through to operational regulatory provisions such as codes and guidelines.</p>

2. Information Instruments

Pure information instruments include planning certificates (official statement of planning controls applying to a property) and notations on land title. These instruments can be used to provide information to existing and prospective landholders about potential hazards. The intent is to facilitate autonomous adaptation through education and increased awareness, although they can also be used by planning agencies to manage legal risks. Other planning instruments, such as agreements on title, can and are used to convey information, but also have a regulatory function, placing binding covenants on landholders.

Examples: All jurisdictions have similar arrangements for the issue of planning certificates at point of sale. E.g., NSW - s 149 certificates (*Environmental Planning and Assessment Act 1979*) – required to include coastal hazard category (currently under review); Victoria – s 32 statements under the *Sale of Land Act 1969* (Vic) list all applicable zones and overlays, and make specific reference to mapped bushfire prone areas. Notations on title are currently used in the Northern Territory where a property falls within mapped storm surge areas; and have been proposed to disclose coastal hazard information in Western Australia *Draft State Planning Policy 2.6* (Feb 2012).

Advantages	Challenges	Implementation
Direct disclosure before or at point of sale can influence decision making.	Likely to encounter significant community resistance regarding <i>perceived</i> impact on property values.	Consider broader use of notations on title in relation to hazard profile of land due to consistency.
Potential hazard exposure may be reflected in property value.	Liability concerns may deter use – authorities must take care in relation to the provision of false or misleading information.	Strengthen and streamline use of planning certificates to convey hazard information, including: <ul style="list-style-type: none"> - clear guidance on information to include and communication of uncertainties; - timing of disclosure should enhance effectiveness, e.g., prior to the point of sale; - clear roles and responsibilities for information provision and processes to monitor and encourage compliance.
Incentive for property owners to maintain hazard mitigation measures.		
Transparent provision of information on potential hazard exposure lowers likelihood of future liability for governments.		

3. Regulatory Instruments

Regulatory instruments are legally enforceable restrictions placed on land use activities that dictate where, what and how use and development occurs; and can therefore be used to influence exposure and vulnerability to climate hazards. These instruments have been categorised as either *fixed* or *flexible*.

Fixed regulatory instruments are based on the assumption that once lawfully commenced, an existing land use will be beyond the reach of the planning system and can continue indefinitely unless intensified, expanded or abandoned. These instruments specifically target new and re-development.

The core regulatory instruments currently in use include zones and overlays which identify hazard areas and are used as the basis for spatial development controls; planning permit requirements for vulnerable land uses in identified hazard areas; and approval conditions (such as set-backs, floor levels, defensible space) which are used to minimise risks. Agreements on title may be used to bind future landholders in relation to hazard mitigation activities. Codes and guidelines provide additional detail

for decision-makers on acceptable standards and conditions, and help to promote consistent decision-making.

Examples: South Australia – coastal zones are used to trigger development assessment processes, including referral to SA Coast Protection Board; Victoria – Bushfire Management Overlay requires a planning permit for subdivision, buildings and works, and the associated Particular Provisions of the Victoria Planning Provisions codify development standards. Hazard mapping and management plans perform a similar function in NSW, under the *Coastal Protection Act 1979* (NSW) and *Rural Fires Act 1997* (NSW).

Advantages	Challenges	Implementation
<p>Critical tools to allow responsible authorities to dictate the location, nature and form of use and development so as to minimise risks.</p>	<p>Availability and costs associated with developing down-scaled hazard information to support spatial planning regulations.</p>	<p>Clearer policy guidance at state level re. use of regulatory instruments to manage climate change risks is required in many jurisdictions, especially for coastal hazards.</p>
<p>Hazard management planning may allow planning response to be considered in conjunction with other policy responses (e.g., emergency management) and may involve broader range of stakeholders than traditional land use planning approaches.</p>	<p>Lack of clear policy guidance in some jurisdictions (esp. in a coastal context) re. relating climate change information to development controls (risk based approach to land use zoning).</p> <p>Poor monitoring and compliance of permit conditions, particularly given local government resource constraints.</p>	<p>Address compliance and enforcement gaps:</p> <ul style="list-style-type: none"> - ensure decision-makers consider compliance in development assessment; - require agreements on title to bind current and future owners re. hazard measures; - investigate options to require landholders to monitor and report on compliance; - ensure sufficient resources for local government monitoring and enforcement in priority areas. <p>Increased prescription and careful parameters around discretion for decision makers will help to address:</p> <ul style="list-style-type: none"> - lack of capacity at local government scale to develop climate change response; and - conflict and excessive planning appeals that increase transaction costs and inconsistencies in policy responses.

Flexible regulatory instruments specifically provide governments with the power to control land use and development, even after it has lawfully commenced. As such, they allow a more responsive approach in light of uncertainties surrounding the distribution, timing and magnitude of climate change impacts. They include qualified development or use rights, such as time or event contingent development approvals (for new development); or involve a modification of existing lawful uses (for existing developments). State and territory governments have broad legal powers to impose new hazard-related regulations on existing uses without providing compensation, including that buildings be removed or modified to minimise risks.

Examples: There are only isolated examples of local government areas experimenting with time or event contingent approvals for new development. E.g., NSW – Byron and Tweed Shire Development Control Plans provide an event-based trigger for new development in areas subject to coastal erosion. E.g., Victoria - Glenelg Shire Planning Scheme sets development restrictions on a lot-by-lot basis to manage existing and future coastal hazards, including a condition that an agreement on title be established to require the removal or relocation of buildings in the event of coastal erosion. For existing development, there are no known examples of regulation requiring modification of existing uses in the context of coastal or bushfire hazards; and a clear preference for the use of community education measures to inform residents in hazard-prone areas of retro-fit, evacuation or other hazard mitigation options.

Advantages	Challenges	Implementation
<p>Qualified development or use rights for new development ensure future hazard impact costs are minimised, while also allowing for land to be used until the point at which hazards materialise.</p>	<p>Cautious approach to the use of qualified development or use rights among practitioners as a result of:</p> <ul style="list-style-type: none"> - perceived political difficulties for future governments to exercise options - difficulties planning and providing reticulated services (particularly sewerage) - reluctance from financial institutions to lend money on the security provided by land subject to contingent and time-limited approvals. <p>Prevailing social norms suggest governments will be unlikely to regulate to modify existing uses without some level of compensation or an accompanying financial incentive.</p> <p>Increased regulation would require increased resources for compliance and enforcement.</p>	<p>Time and/or event development approvals more suitable to coastal than bushfire context due to nature of hazard.</p> <p>Further policy guidance required on the use of these mechanisms.</p> <p>Regulation to modify existing uses may be appropriate when landholders are unresponsive to information and voluntary measures; and may be successfully combined with financial incentives.</p>

4. Compulsory Acquisition Instruments

The compulsory acquisition of land is regulated by statute in all jurisdictions, and is generally only carried out with compensation. An alternative to upfront acquisition is the designation of land for later acquisition by a nominated authority. Compulsory acquisition of hazard-prone land can be combined with certain voluntary instruments to lower costs to government, such as property purchase-lease back schemes (after purchase, land is leased back on terms and conditions that facilitate the management of climate hazards) and purchase-covenant-resale schemes (after purchase, land is resold subject to positive or restrictive covenants regarding use and development).

Examples: There are few known examples of compulsory acquisition in the context of climate adaptation initiatives. E.g., Qld – following the 2011 floods, a program of designation of acquisition land was introduced - landholders are not obliged to sell immediately, but may only dispose of subject land to approved authorities, Acquired land will be transferred to more suitable uses such as public recreation.

Advantages	Challenges	Implementation
Particular application where public benefits can be clearly identified to justify public investment – e.g., imminent threat to human life or safety, environmental or equity outcomes.	Highly contentious due to costs, financing options and distributional concerns.	To lower costs and increase political acceptability, compulsory acquisition programs could be combined with voluntary instruments.

5. Voluntary Instruments

Voluntary instruments include financial incentives to modify the location and nature of land use and development so as to minimise exposure and sensitivity to hazards; or buy-back of hazard prone land to reduce vulnerability. Land swap or transferable development rights initiatives have a similar function to voluntary buy-backs.

Examples: There are no known Australian examples of financial incentives directed to climate adaptation outcomes. There has been some limited specific or general offer buy-back of hazard prone land, usually in the aftermath of an extreme event. E.g., Qld - *Brisbane City Council* established the *Voluntary Home Purchase Scheme*, after a 2005 investigation into flood risks in Brisbane, targeting residential properties in areas subject to regular flooding . E.g., Vic - Following 2009 bushfires, a voluntary buyback program was established to acquire properties affected by the fires. Land swap has also been implemented in the aftermath of the 2011 Qld floods in the Lockyer Valley, where affected landholders were offered land in a more elevated area in exchange for flood-prone land. Although used extensively in the US to achieve environmental protection outcomes, there has been limited practical experience of transferable development rights in Australia.

Advantages	Challenges	Implementation
<p>Can be designed to achieve similar outcomes to regulatory and compulsory acquisition instruments, yet typically attract less opposition and may be more politically feasible.</p>	<p>Significant direct financial costs to government.</p> <p>Distributional concerns - ensuring that government investment is proportional to associated public benefits.</p> <p>Limited empirical work on use and effectiveness of voluntary instruments.</p>	<p>Considerable scope for the use of financial inducements to incentivise hazard mitigation activities by private parties, in combination with education and/or regulation of existing uses:</p> <ul style="list-style-type: none"> - e.g., to assist in establishment and maintenance of defensible space around dwellings to mitigate bushfire risks; - e.g., to assist in the upgrade of buildings to minimise exposure to natural hazards. <p>Buy-back and land swap should strategically target areas of highest risk; where the transfer of land to public management will provide important public benefits.</p>

6. Taxes and Charges

Adaptation-related *taxes* can be used in two ways - to prompt changes in land use and development patterns through the use of price signals (such as elevated council rates imposed on particular land uses in hazard areas or reduced rates for undertaking adaptation measures); and to raise funds to finance preparations for, and responses to, climate hazards. *Charges* can be used to recoup costs associated with protective or remediation measures provided to particular communities or landholders.

Examples: There are currently no known examples in Australia of taxes (e.g., rates) being used specifically to provide incentives to landholders to alter land use patterns in response to bushfire and coastal hazards. However, taxes have been used to raise funds to finance hazard responses. E.g., Vic - Fire Services Property Levy – charges all property owners an additional ‘levy’ on council rates to cover fire services. E.g., Following the 2010-11 floods in Qld and Vic, the Federal Government introduced the flood reconstruction levy, a 12 month, temporary, income-based reconstruction tax, with exemptions for those directly affected by the floods. Hazard-related charges have been more widely used in Australia, particularly in the context of coastal protection works such as sea walls, however their use is inconsistent, and there are many protective structures and other hazard mitigation activities which lack any direct cost-sharing measures.

Advantages	Challenges	Implementation
<p>Taxes and charges send a price signal that can trigger desired land use and behavioural changes.</p> <p>Taxes spread adaptation costs across the community.</p> <p>Charges ensure that costs are borne directly by those who benefit.</p>	<p><i>Taxes to prompt land use change</i> are likely to face a number of difficulties including:</p> <ul style="list-style-type: none"> - likely political opposition from affected stakeholders; and - most landholders likely to be relatively unresponsive to taxes. <p>Distributional concerns re. <i>taxes to finance hazard response and preparation</i> - as they spread the costs across the broader community, not just those who are directly impacted.</p> <p>Planning agencies, including local government, may not have the legal power to unilaterally introduce taxes.</p> <p><i>Charges</i> can be politically difficult to implement, especially in relation to existing structures and services.</p> <p>They may require specific statutory powers to allow enforcement and involve significant transaction costs.</p>	<p>Investigate further use of taxes and charges as part of funding strategies for adaptation.</p> <p>General rates and land taxes may be particularly applicable to raise revenue to cover wider community benefits of adaptation measures (such as beach nourishment).</p> <p>Special charges are recommended to raise contributions for properties in identified hazard areas.</p> <p>A consistent approach to charges for existing and new projects should be developed.</p>

7. Liability Shield Instruments

Local governments continue to identify the risk of potential legal liability and costs associated with defending a legal challenge as significant barriers to adaptation decision-making. There are two main options to address both the real and the perceived risk of potential exposure to liability: requiring indemnity from developers for particular developments; and introducing a statutory exemption from liability. These are not spatial planning instruments *per se*, but are included as an integral component of a legal framework for supporting government efforts in implementing the full range of available instruments.

Examples: There is no state level provision for local government to require an indemnity from developers as a condition of development approval in hazard zones, although some local councils have used or are considering using these measures (e.g. Tas – Clarence City Council). To date, NSW is the only jurisdiction to introduce a statutory exemption from liability: s 733 of *Local Government Act 1993* (NSW) provides a broad statutory exemption from liability in negligence or nuisance (or other claims, in respect of actions taken and decisions made in relation to land subject to a range of risks) for local councils provided they can demonstrate compliance with any applicable manual, guideline or code or otherwise demonstrate good faith. This exemption is specifically directed at actions taken in respect to land that is liable to flooding, subject to bushfire risk or within the coastal zone.

Advantages	Challenges	Implementation
<p>Can prevent the risk (or perception of risk) of legal liability leading to perverse outcomes (e.g., overly cautious planning response).</p> <p>Individual indemnities force developers to internalise the costs of development risk .</p>	<p>Little experience with indemnities and uncertainty as to whether they will be upheld.</p>	<p>Broad support for introduction of statutory exemption similar to NSW in all state regimes.</p> <p>Statutory exemption should be supported by hazard management manuals to set parameters around what is considered to be <i>acting in good faith</i>.</p> <p>Individual indemnity contracts may be applicable in some situations, particularly to provide a financial guarantee from developer.</p> <p>Planning legislation or instruments should provide for use of indemnities to ensure legal validity.</p> <p>Guidelines on the use and design of indemnity conditions are required for effective use.</p>

