

EMBARGO: 0001 Tuesday, 27 February 2024

CLIMATE CHANGE

PRACTITIONER GUIDANCE



THE LAW SOCIETY
OF NEW SOUTH WALES

1 WHY PUBLISH GUIDANCE AND WHO SHOULD USE THIS GUIDANCE

Is it within the scope of a solicitor's obligations to advise on climate-related risks?

We suggest that there is an evolving duty of care owed by solicitors to their clients to provide advice regarding a legal problem which meaningfully addresses any climate change issues and related consequences.

This guidance explores the principles that apply when considering:

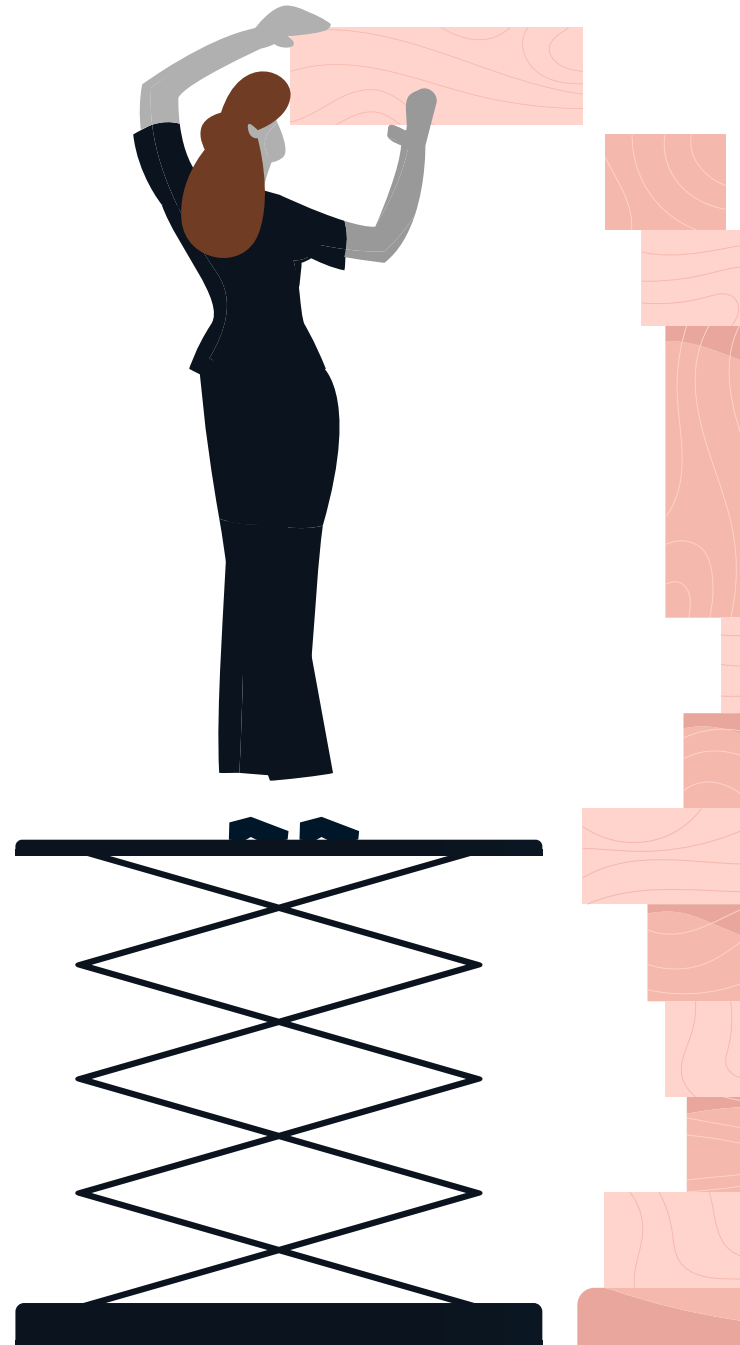
- How climate change legal risks may be relevant to client advice
- Issues that may be relevant when considering the interaction of legal advice, climate change and solicitors' professional duties
- Issues which may be relevant when considering the solicitor-client relationship in the context of climate change

Climate-related risks will affect most clients and nearly all areas of legal practice. For this reason, this guidance is relevant to all members of the Law Society.

This guidance is not intended to be a complete synopsis of the legal implications of climate change for New South Wales practitioners. However, it is hoped that the guidance and resources on our website will provide a useful guide for those practitioners who are unfamiliar with the legal issues associated with climate change and its impacts.

While Lawcover is supportive of the Law Society providing guidance on these issues, this should not be interpreted as Lawcover's regulatory position on these matters.

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1. The Law Council has indicated that it will review this Policy, with input from its constituent bodies, in 2024.

2 BACKGROUND

The Law Council of Australia published its *Climate Change Policy* in November 2021.^[1] The Policy states that lawyers should advise clients on the legal implications of climate change in accordance with professional standards and legal ethics:

We suggest that there is an evolving duty of care owed by solicitors to their clients to provide advice regarding a legal problem which meaningfully addresses any climate change issues and related consequences.

Lawyers should be alive to the unfolding implications of climate change and its consequences, and they should be informed, skilled and ready to assist clients on climate change-related legal matters, within their areas of skill and competence[...]

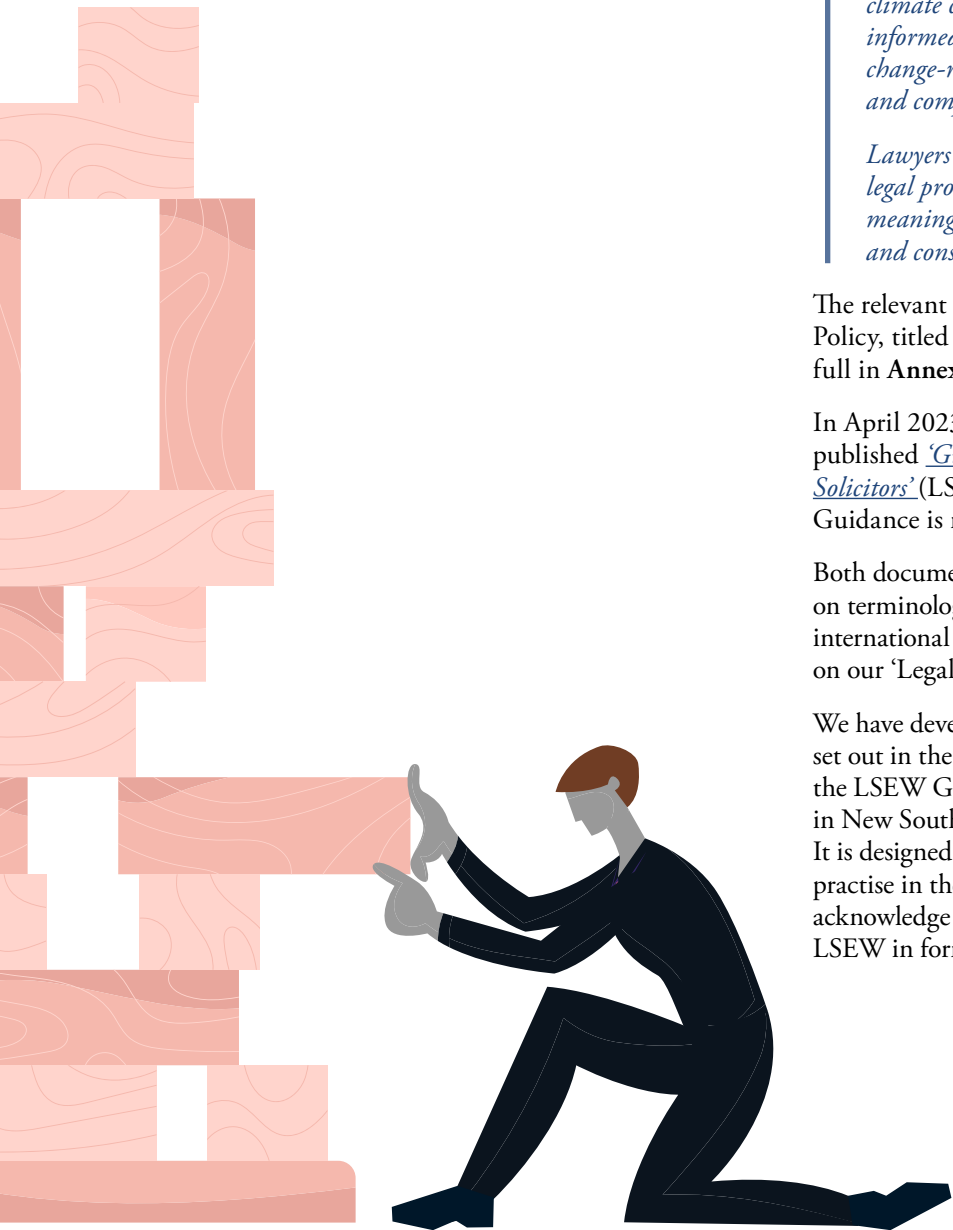
Lawyers should be aware that advice regarding a legal problem should be provided in a manner which meaningfully addresses any identified climate change issues and consequences.. (see paragraphs 53 to 56).

The relevant section of the Law Council's Climate Change Policy, titled 'Principles for the legal profession' is set out in full in **Annexure A** to this guidance.

In April 2023, the Law Society of England and Wales also published '*Guidance on the Impact of Climate Change on Solicitors*' (LSEW Guidance), and stated that the LSEW Guidance is relevant to all its members.

Both documents contain useful background information on terminology, climate risk disclosure frameworks, and international developments. There are also resources available on our 'Legal Implications of Climate Change' [webpage](#).

We have developed our guidance, which applies the principles set out in the Law Council's Climate Change Policy and the LSEW Guidance, in the context of the legal landscape in New South Wales and, where relevant, Australia-wide. It is designed to assist practitioners to consider the way they practise in the context of climate change. We gratefully acknowledge the assistance provided by the Law Council and LSEW in formulating these principles.



3 CLIMATE CHANGE RISKS: AN OVERVIEW

RISKS AND OPPORTUNITIES

Climate change, and responses to climate change, give rise to long term material, physical and transition risks. This results in shifting legal demands, which in turn creates both risks and opportunities for the legal profession.

Businesses and government agencies face new risks, liabilities and challenges in light of the physical and transition risks of climate change, and increasingly, are seeking legal advice to navigate them. Novel and complex questions of law are arising, and are likely to continue to arise, across multiple legal practice areas, from corporate governance to occupational health and safety, planning and development, insurance, water rights, and many other areas requiring tailored legal advice to meet myriad climate change-related challenges and opportunities.

Evidence of changing legal practice on climate change related issues at a structural level can be seen in the resource allocation by many large law firms, which have created practice groups dedicated to advising clients on these issues. Those firms have shown their appreciation of the critical long-term challenge climate change represents for businesses, spanning many practice areas.

Climate change legal risks can be grouped into the following categories:

• Physical risks

These risks are associated with climate change-related weather events, such as rising temperatures and sea levels, and an increased frequency and intensity of extreme weather events, such as flooding and bushfires.

• Transition risks

These are the risks arising from the behaviour of regulators, commercial institutions (such as insurers and banks), and the community at large. These risks include:

- New climate-related legislation or regulation
- Alteration of existing legislative or regulatory requirements
- Shifting client expectations, duties of care and competency requirements
- Target setting

• Liability risks

These are the risks of being held to account for contributing to, or failing to adapt to, climate change, and include:

- Legal liabilities for law firms, governments and organisations from clients or businesses seeking compensation for losses arising in relation to physical or transition risks
- Potential risk of negligence claims in the event of inaccurate advice or failure to warn of upcoming legal requirements
- Client exposure to litigation - including for greenwashing and costs associated with climate change litigation.

The examples in **Table 1** highlight some of the climate legal risks that solicitors may need to consider in common transactions. These examples are included for illustrative purposes only and are not designed to be comprehensive.²

2. Tables 1 and 2 reproduce, in large part, the text in the Annexes to the LSEW Guidance.

TABLE 1: CATEGORISATION OF CLIMATE RISKS

Risk Type	Examples	Potential climate legal risks created and impact on client advice
Physical risks	More severe and more frequent extreme weather events (storms, floods, droughts and heatwaves) will impact on commercial and residential buildings, transport infrastructure and business operations (such as supply chains), agricultural output and more broadly can lead to loss of life and migration.	<ul style="list-style-type: none"> • Consider the impact on asset values and potential commercial impacts, for example, counterparty risk allocation, insurance, directors' duties, share price. • Consider the impact of physical events on conveyancing transactions and whether any climate related risks are disclosed in the transaction documents. <ul style="list-style-type: none"> ▫ Is it necessary for a purchaser to carry out further investigations to identify these risks, such as obtaining specialist technical reports? ▫ If advising on insurance or financing, address the impact of climate related events on the cost and availability of insurance and how this affects the price or the decision whether to buy. Consider the risk that certain properties become uninsurable or ones for which mortgage finance cannot be obtained. Be aware of potential additional commercial contracts, such as increased PI or other insurance premiums. • Consider the risk allocation relating to the impact of physical events on clients' businesses (when advising on acquisitions and asset purchases, for example). How will climate events affect the business' supply chain and outputs? Will this affect the financing of transactions? How will the client mitigate their greenhouse gas emissions and adapt to be climate resilient? • Advice on an acquisition or asset purchase should consider how it will affect the client's emission reduction targets and what adaptation of the asset may be needed to improve climate resilience. Associated risks and costs should be flagged.
Transition risks	Policy, legislative, regulatory and market changes to support the just transition to a net zero economy. This could include legislation requiring mandatory carbon reporting, to report on carbon footprints or a requirement to produce climate transition plans.	<ul style="list-style-type: none"> • Factor emerging climate regulation (on climate reporting, for example) into advice so that the client is aware of upcoming requirements. • Be aware of how changes in client demand or stakeholder sentiment could affect asset values and operating costs and advise on legal options in relation to allocation or mitigation of commercial risks. For example, the sale value of a company with a high carbon footprint could change rapidly as market tolerance for fossil fuel shifts.
Liability risks	Legal liabilities for law firms, governments and organisations from people or businesses seeking compensation for losses arising in relation to physical or transition risks. Businesses may be sued by those impacted by climate change for their contribution to climate damage.	<ul style="list-style-type: none"> • Potential negligence claims could arise for solicitors including in the areas of conveyancing and commercial transactions, highlighting climate risks associated with real property and business assets. • Advise on client exposure to greenwashing challenges or climate-related litigation. • Be aware of client exposure to regulatory action for breaches of disclosure obligations. • Potential negligence claims could arise for government authorities, technical certifiers or other organisations for failing to account for, or adapt to, climate change, including carrying out regulatory roles or operating public infrastructure.

4 THE IMPACT OF CLIMATE CHANGE LEGAL RISKS ON SOLICITORS' PROFESSIONAL DUTIES

4.1. DUTY OF CARE

Solicitors have a general legal duty to exercise reasonable skill and care. The standard is that of a reasonably competent practitioner (Oliver J in *Midland Bank Trust Co Ltd v Hett Stubbs and Kemp* [1979] Ch384 at 403).

Climate change and its consequences are leading to changes in what is to be expected of a competent and careful lawyer. Incorporating the climate change consequences of actions in legal advice is a necessary corollary of the lawyer's duties to their client.³

While the precise scope of a solicitor's duty will always be determined on a case-by-case basis, there are a range of situations where courts have been inclined to find that a solicitor is obliged to warn their client of a risk associated with a transaction.

These include where a solicitor is aware of information pertinent to their client's interest and /or is aware of obvious risks, where the solicitor professes to have specialised skills and expertise, and /or where a client is particularly vulnerable.⁴

These ideas are examined further below.

4.2. DUTY TO WARN

Climate change legal risks may have an impact on a solicitor's duty to warn clients of the potential legal risks in certain contexts.

A solicitor has a duty to warn a client about potential risks by pointing out hazards of a kind which should be obvious to the solicitor but that the client may not appreciate. In *Provident Capital Ltd v Papa* [2013] NSWCA 36; (2013) 84 NSWLR 231, Macfarlan JA (Allsop P and Sackville AJA agreeing) said (at [80]):

A solicitor's obligation is not simply to explain the legal effect of documents but to advise his or her client of the obvious practical implications of the client's entry into a transaction the subject of advice.

This may extend to information obtained while fulfilling the solicitor's retainer, whether or not the matter in question

is strictly within the scope of the retainer or not (see, for example, *Kumar v Western Sydney Realty Pty Ltd v Anor* (No 2) [2021] NSWDC 446).

The duty to warn should be addressed at all stages of giving advice to a client. A solicitor may have a greater obligation, where the solicitor is aware that the client is particularly vulnerable, whether from lack of information or otherwise, to offer warnings or information that is incidental to the legal work being carried out to ensure that the client understands the full ramifications of the undertaking.⁵

4.3. DUTY TO DISCLOSE

When acting in a matter, solicitors have a duty to disclose to their client all information material to that matter of which they have actual knowledge. In the context of climate change, this means that where a solicitor becomes aware, while acting in a matter, that there are climate legal risks which might impact the client's interests in-scope of the retainer, the solicitor should disclose such risks to their client in a clear and understandable way.

See rule 7.1 of the *Legal Profession Uniform Law Australian Solicitors Conduct Rules 2015* which provides:

7.1 A solicitor must provide clear and timely advice to assist a client to understand relevant legal issues and to make informed choices about action to be taken during the course of a matter, consistent with the terms of the engagement

4.4. DUTY TO UPHOLD SERVICE AND COMPETENCY LEVELS

Solicitors must ensure that they provide a proper standard of service to their clients. In doing so, they should have regard to their regulatory obligations to "deliver legal services competently, diligently and as promptly as reasonably possible" (rule 4.1.3). Solicitors should also refer to the continuing competencies required of all solicitors under the *Legal Profession Uniform Continuing Professional Development (Solicitors) Rules 2015* (see rule 7.1.3).

3. See, for example, '*Climate Conscious Lawyering*', 13 December 2021 by Justice Brian Preston, Chief Judge, Land and Environment Court, 6.

4. See, for example, Elizabeth Wild and Sarah Mansfield, 'NSW lawyers' evolving duty of care to advise and warn on climate risks', *Law Society Journal*, 2023.

5. Ibid and see the discussion of these issues in *Cousins v Cousins* [1991] ANZ ConvR 245, 248.



This means that solicitors should, among other things:

- maintain the level of competence and legal knowledge needed to practise effectively, considering changes in practice context and developments in the law, including in relation to climate risks
- inform clients, in a timely way, of key facts and issues, including risks and mitigation strategies

4.5. ACTIONS TO TAKE WHERE THERE ARE GAPS IN COMPETENCE

Not all solicitors can discuss climate-related legal issues competently with their clients where these may be relevant or material to a particular client or matter. A solicitor who does not have the relevant knowledge of the impact of climate change on the legal area they are advising on should not provide advice if it is outside their knowledge or competence. When a solicitor identifies a legal risk but considers they are unable to advise, the solicitor should liaise with their client about seeking specialist third-party assistance, such as technical consultants.

It may also be prudent to consider professional training to develop competence in preferred practice areas. This is advisable, because as solicitors increasingly undertake training in these areas as part of their professional development, then, over time, the expectation of what a competent solicitor should be aware of in relation to the impact and relevance of climate-related risks in their area

of practice may shift. The general standards that a solicitor is required to meet to discharge their duty of care to clients in this area may, over time, require a solicitor to be able to discuss climate-related legal issues competently, where these are relevant or material to the client or matter. Alternatively, where a relevant legal risk is identified, the solicitor could liaise with the client about seeking specialist third party assistance, including instructing technical experts.

4.6. HOW MIGHT A SOLICITOR DISCHARGE THEIR PROFESSIONAL DUTIES IN RELATION TO CLIMATE RISKS?

Solicitors should have an understanding, where relevant, of how climate legal risks impact their practice areas and clients. This will depend on the information and tools in their possession to determine the extent of climate risk in relation to a matter.

Solicitors must balance competing considerations when providing advice on the implications of risk - a solicitor must advise their client of the obvious practical implications of the client entering into the transaction the subject of the advice, but should not, however, provide opinions which they are not qualified to give. See the commentary on this point in relation to financial advice in *Citicorp Australia Ltd v O'Brien* (1996) 40 NSWLR 398 at 418.

See **Table 2** for some examples of climate related legal risks for some practice areas.

TABLE 2: EXAMPLES OF CLIMATE-RELATED LEGAL RISKS FOR SPECIFIC PRACTICE AREA

Practice area	Relevant legal advice and services
Corporate governance and risk management	<p>Advice on corporate governance and risk management structures should include oversight and management of the risks and opportunities presented by climate change.</p> <p>It is necessary that the solicitor factor into advice, where relevant, the legal implications of climate change for their clients, the transition to a net zero carbon economy, and any related claims and commitments made by the clients, together with emerging governance, risk management and disclosure frameworks and best practice standards (such as the recommendations of the Taskforce on Climate Financial Disclosures, and developing standards for transition planning). For corporate clients, this includes directors’ duties and liabilities in relation to the management of climate change risk.</p> <p>See the commentary in Annexure B generally and the ‘questions framework for the board’ in the LSEW ‘Climate risk governance and greenwashing risks guidance’ here.</p>
Corporate reporting and due diligence directive disclosure obligations	<p>When advising companies on disclosure and reporting, solicitors must be aware of the rapidly evolving international and national policy and regulatory regimes with attendant disclosure requirements and how their clients are affected.</p> <p>See the commentary in Annexure B under “Corporations”</p>
Disputes / potential challenges	<p>Disputes lawyers advising commercial clients should understand and advise clients on:</p> <ul style="list-style-type: none"> • Global developments in climate litigation and the increasing likelihood of litigation in relation to climate change (including strategic climate litigation). • The variety and innovation in claims brought in relation to climate change, (greenwashing, biodiversity damage, protected species and human rights), and the parties bringing them (shareholders challenging boards, NGOs and individuals, challenging governments and corporations, and governments carrying out increased regulatory action against corporations) <p>Solicitors should advise clients on climate litigation risk, including developing appropriate mitigation and oversight mechanisms and avoiding misrepresentation.</p> <p>See the commentary in Annexure B on ‘Advising clients on their climate-related representations’</p>
Real estate / Asset based transactions	<p>Solicitors should advise on legal risks associated with the physical impacts of climate change, including risk allocation in a transaction, climate risks disclosed in transaction documents, limitations of disclosure obligations in relation to climate risks and how they impact real estate ownership and use, such as inaccessibility, uninsurability and unavailability of capital investment.</p>
Commercial contracts and agreements	<p>Solicitors should address the climate impact and risk of a transaction in the relevant commercial agreement and advise on potential terms to ensure that the impacts are reduced or avoided, and the risks are adequately managed so that liability risks are avoided. Model climate clauses for a wide variety of agreements are available from several sources, including The Chancery Lane Project.</p> <p>For more information, see the commentary in Annexure B in “Climate clauses”.</p>
Human rights / social governance issues	<p>When advising commercial clients, solicitors should be aware that there is growing recognition of climate change as a human rights concern (including concerning its impacts on other fundamental human rights), including a just transition in developing economies, and how such standards may enhance clients’ responsibilities in relation to climate change, including related due diligence requirements and obligations to mitigate any adverse human rights impacts identified.</p> <p>Solicitors could also consider pro bono opportunities available to assist vulnerable, marginalised or disadvantaged communities, noting that the impacts of climate change are sometimes disproportionately felt by such groups.</p>

5 THE IMPACT OF CLIMATE CHANGE ON THE SOLICITOR-CLIENT RELATIONSHIP IN PRACTICE

5.1. HOW TO PRESENT TO PROSPECTIVE CLIENTS AND THE PUBLIC

As the impacts of climate change reach further into more areas of society and the law, solicitors may be expected to guide and support clients as they navigate these challenges.

Solicitors should therefore adopt a proportionate approach to climate change. Relevant factors to consider when advising are:

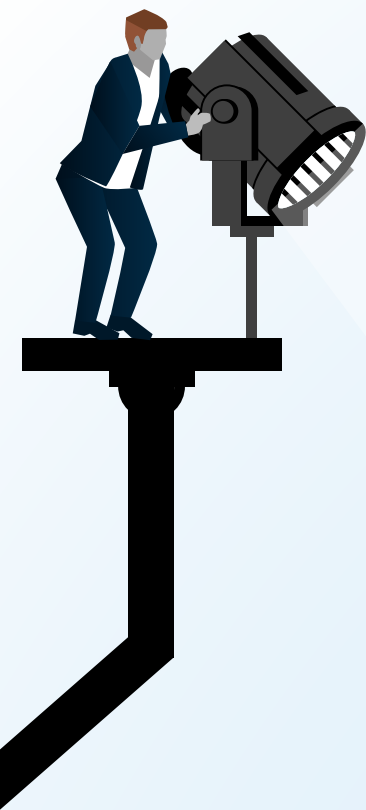
- The nature of the client's operations and interests
- The specifics of the matter
- The legal services offered
- The impact of the issue on the clients, the transaction, the climate and the public

Practitioners and firms should communicate their approach to providing legal advice in the context of climate change to clients, prospective clients, and the public, where appropriate.

5.2. HOW TO APPROACH A NEW INSTRUCTION

When presented with a new instruction, solicitors should consider whether climate legal risks may be material to their advice. The same factors identified in section 5.1 are relevant here also.

In some cases, for example where climate-related legal issues are marginal to the subject matter of the new instruction, good practice may involve simply ensuring the client understands how such issues may be relevant. It is necessary, as in all matters undertaken, that it is clearly set out, preferably in writing, what advice falls within and outside the solicitor's retainer and how this relates to their fee proposal.



5.3. HOW TO DECIDE WHETHER TO ADVISE

Solicitors are not obliged to provide advice to every prospective client that seeks it and have a wide discretion in choosing whether to accept instructions. Climate-related issues may be valid considerations in determining whether to act.⁶

Considerations may include:

- The ability to advise competently
- The client's willingness to engage on climate-related issues
- Any potential impact on the firm's reputation
- Any apparent conflict with the client organisation's stated values

This is a matter for individual solicitors and law firms, recognising solicitors' professional obligations.

5.4. THE SCOPE OF THE RETAINER

A solicitor and client can agree to limit the terms of the retainer, to limit the solicitor's duties. It may be possible, in some circumstances, to limit the scope of the retainer to expressly exclude climate issues, for example the solicitor is not competent to advise or where the client is obtaining their own technical advice.

It would be prudent to ensure that there is a written record of that agreement. However, this is not straightforward in the case where there are or could be material climate legal risks beyond the competence of the solicitor. To obtain the client's informed consent to the exclusion from the retainer, an explanation of the relevant issues and risks is required, noting the duty to warn the client of these issues and the need to get specialist advice.

However, as the LSEW Guidance notes, where climate legal risks are relevant, limiting the retainer in this way becomes less realistic in practice, given that such risks impact so many areas of activity (see the annexures):

This may make it undesirable, competitively and reputationally, for some firms to try to carve out climate legal risks from the retainer other than in narrow and specialised circumstances.⁷

6 EDUCATION MATERIALS AND RESOURCES

This guidance has referenced the need for solicitors to source appropriate education resources to equip themselves to be able to provide competent advice on relevant climate legal risks.

Solicitors also need to be aware of other relevant professionals whose skills may be needed.

There are many resources to support solicitors and firms and these will continue to grow. We have provided some resources in our 'Legal implications of Climate Change' [webpages](#). These resources are not designed to be exhaustive, but to provide initial assistance to solicitors considering this guidance and will be updated from time to time.

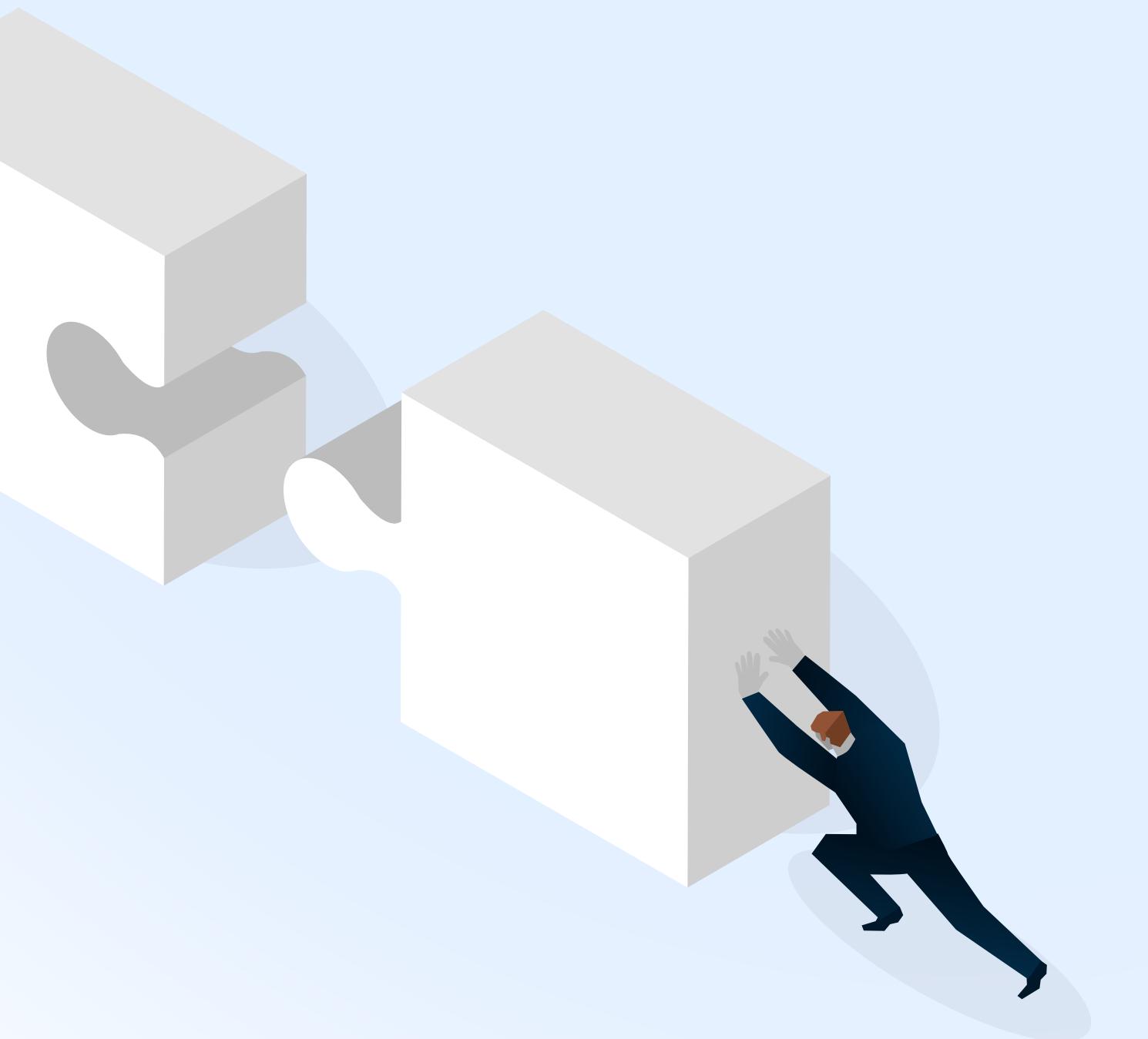


6. The LSEW Guidance notes that the principle of access to justice and the right to legal representation are fundamental aspects of our legal system and while there are established examples of where this intersects with solicitor's duties, solicitors have a wide discretion in choosing whether to accept instructions in a particular case. See section 4.3. See also the discussion of this issue in the Law Council of Australia, ['Legal Implications of Climate Change Background Paper'](#), 2022, 111-112.

7. LSEW Guidance, section 4.4. LSEW Guidance, section 4.4.

7 SECTOR-SPECIFIC GUIDANCE

We have provided some information resources and examples of sector-specific guidance on particular areas of law to address how solicitors should advise clients on climate change legal risk in [Annexure B](#). We will continue to develop these resources.



ANNEXURE A

LAW COUNCIL OF AUSTRALIA'S 'PRINCIPLES FOR THE LEGAL PROFESSION'

As stated in the introduction section, the Law Council published its Policy Statement, *Climate Change Policy in 2021*. The section titled 'Principles for the legal profession' is set out below:

Lawyers should advise clients on the legal implications of climate change in accordance with professional standards and legal ethics

53. Lawyers should be alive to the unfolding implications of climate change and its consequences, and they should be informed, skilled and ready to assist clients on climate change-related legal matters, within their areas of skill and competence.
54. Lawyers should be responsive to the broad spectrum of clients across the Australian community facing new legal risks, liabilities and challenges in light of the physical and transitions risks of climate change.
55. With respect to their ethical obligations in the context of climate change, lawyers should be aware that existing professional ethical standards, which set out the core standards to be observed, provide appropriate guidance as to the proper professional role of a legal practitioner.
56. Lawyers should be aware that advice regarding a legal problem should be provided in a manner which meaningfully addresses any identified climate change issues and related consequences, including the possible risks, liabilities and reputational damage which may flow from activity that has a negative impact on climate change. It is not suggested that lawyers should offer advice on matters unconnected to legal issues or outside the scope of their retainer, but rather, that legal advice should take into account the full range of contextual circumstances in which it is given, consistently with professional obligations.

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