Legal issues and information on natural hazards

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Information is fundamental to natural hazards management yet councils and other authorities suggest that they are reluctant to provide specific information about risks such as flood or fire risk, to property owners or prospective purchasers. This reluctance arises from a fear that they will be liable to pay damages if the release of the information has adverse consequences, for example by reducing the market value of the affected property. This article will look at Australian law to identify whether authorities would owe a duty of care to homeowners not to disclose risk information; and whether authorities owe a legal duty to disclose known risk information. It will be shown that there is no legal impediment to releasing reasonably accurate hazard information. Failure to do so will distort the property market and the potential liability to subsequent purchasers could be much greater than any risk of legal liability to current owners. Local councils should be proactive in identifying and warning of risk so people can make informed decisions about how they will prepare for and deal with the risks that they face. Releasing hazard information is key to developing resilient communities and sharing responsibility for hazard management.

INTRODUCTION

Anecdotally, at least, local governments (councils) have reported a fear of releasing risk information to affected land owners for fear of legal liability. It is suggested that councils fear that they could be liable if they release information that may impact upon property values either by reducing the market value of the property or by limiting the developments that might lawfully be made on the property. A second potential liability issue might arise if it turned out that the information was wrong, partial or misleading.

This article will consider the legal issues involved when disclosing risk or hazard information to land owners, prospective land owners and developers. It is argued that there is no significant legal risk in providing “reasonably accurate” hazard information. It is consistent with the policy of the law that risk information should be made available to allow people to make their own choices about what risks they will accept and how they will prepare for those risks. A policy to release reasonably accurate hazard information will expose a council to less legal risk than a policy of withholding information or worse, failing to consider at all whether information should be made available.

This article will consider the law of negligence and identify when a duty to avoid causing economic loss can be established. We will then consider the potential legal liability for:

- disclosing reasonably accurate risk information;

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2 The references are to legislation in New South Wales but similar provisions do apply in other Australian States and Territories.

disclosing inaccurate information; and
• disclosing misleading information.

A DUTY OF CARE

The reported fear is that if the information is released, the market value of the properties, now identified as hazard prone, will fall. Prospective purchasers are likely to prefer land that is not hazard prone so demand will fall. Those that are willing to purchase the hazard prone land will not be willing to pay as much as they will have to pay higher costs to develop the land.

The legal action that we will consider is an allegation of negligence. To establish negligence a plaintiff would have to show that the defendant owed the plaintiff a duty of care, that there was a breach of that duty in the sense that the defendant did, or failed to do, something that the reasonable council would not, or would have, done. Finally it must be shown that the fault of the defendant caused the plaintiff to suffer some damage or loss.

In the context of hazard mapping the losses will be “pure economic loss”; that is a legal concept to identify losses that are not linked to any physical damage to people or property. The release of flood maps or other hazard information makes no physical change to the land. The losses, if any, are purely financial (known, in law, as “economic”). Losses do not occur when the map is released. Any potential losses will only become clear if the property is sold, put up as a financial security or a development application is made. Then, and only then, can some comparison be made between property values with and without the flood map. Many factors influence the property market so attributing any alleged diminution of value to the reclassification of the land will become increasingly difficult as time passes between the release of the hazard map and the crystallisation of the alleged losses.

The law has been reluctant to allow the recovery of damages for pure economic loss. In a market economy actions by competitors will impact upon the economic success of others so the market for any product could be restricted if causing economic loss was a tort or wrong. As a result the law has required that a relevant relationship must exist between the plaintiff and the defendant before the defendant will be under a duty to avoid causing pure economic losses.

In Woolcock Street Investments Pty Ltd v CDG Pty Ltd (2004) 216 CLR 515 the majority held that the critical issue was the vulnerability of the plaintiff. Vulnerability was not simply a realisation that the plaintiff was vulnerable to suffer a loss, but “is to be understood as a reference to the plaintiff’s inability to protect itself from the consequences of a defendant’s want of reasonable care”.

McHugh J identified five “salient features” that could give rise to a duty of care to avoid economic loss. They were
• reasonable foreseeability of loss;
• indeterminacy of liability;
• autonomy of the individual;
• vulnerability to risk; and
• knowledge of the risk and its magnitude.

If the losses are reasonably foreseeable, the potential plaintiff or class of plaintiffs can be identified, the imposition of a duty does not unduly restrict personal autonomy, the plaintiff is vulnerable in the terms suggested by the majority, and the defendant knew of the risk, a duty could be found.

Later cases have queried whether there is any value in maintaining the category of “pure economic loss” and further developments in tort law have increased the number of “salient features”.

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4 Woolcock Street Investments Pty Ltd v CDG Pty Ltd (2004) 216 CLR 515 at [21] (Gleeson CJ, Gummow, Hayne and Heydon JJ); [162] (Kirby J).
5 Woolcock Street Investments Pty Ltd v CDG Pty Ltd [2004] HCA 16 at [23] (Gleeson CJ, Gummow, Hayne and Heydon JJ).
6 Woolcock Street Investments Pty Ltd v CDG Pty Ltd [2004] HCA 16 at [74] (McHugh J); citing his own judgment in Perre v Appand (1999) 198 CLR 180 at [105]; Kirby J adopted McHugh’s “salient features” (at [164]). Notwithstanding their identification of the same “salient features” McHugh found that there could be no duty of care (at [114]) whereas Kirby J found that a duty of care could be established and the matter should be remitted for trial (at [191]).
that must be considered to determine whether or not any duty of care exists. In the context of this article, however, and in order to keep the discussion manageable, we shall limit our discussion to the five features identified by McHugh J but acknowledge that there are many other factors that would also be in issue in any actual litigation.

LIABILITY FOR DISCLOSING RISK INFORMATION

Is there a duty of care, owed to landowners that would make councils liable for releasing hazard information? If we consider McHugh J’s criteria set out earlier we may conclude as follows:

1. Reasonable foreseeability of loss: Whether it is reasonably foreseeable that there will be a loss will depend on the particular facts; in some cases property values may go down but in others they may not. It would depend on other market forces including the availability of other land and whether the land could still be used for the desired purposes. As the losses will not be realised until the property is sold or mortgaged, it may be that in the future there is no loss or no loss that can be quantified.

2. Indeterminacy of liability: Indeterminacy of liability is not an issue as the potential plaintiff will be the current owner who may suffer the loss of value. Any future purchaser will be aware of the flood risk and purchase at the adjusted market price.

3. Autonomy of the individual: The imposition of a duty on council not to cause economic loss to landowners would not impose a duty to limit the autonomous action of the plaintiff.

4. Vulnerability to risk: The plaintiff is vulnerable in that they can do nothing to protect themselves. If the release of hazard information is going to affect the market value of the property, then there is nothing the plaintiff can do to avoid that consequence.

5. Knowledge of the risk and its magnitude: The risk in question is the risk of a diminution in value caused by the release of the hazard information. There may be a recognition that such an outcome is possible (that is knowledge), but markets being dynamic and affected by other forces, it would not be possible for the defendant to know the magnitude of the risk, that is what the actual impact is likely to be.

The result is that a council could owe a duty to avoid causing pure economic loss to a plaintiff land owner, but it does not follow that they do owe that duty. The question of whether or not there is a duty of care is a question of law, even though it depends very much on the facts of the particular case. In the absence of actual facts, there is no clear answer to the question of whether or not a duty of care is owed. The most that we can conclude is that the existence of a duty is at least, arguable.

If, for the sake of the argument, we assume that there is a duty owed to the plaintiff land owners it does not follow that hazard information should not be released. The duty is not a duty to protect the land owners’ interests at all costs, it is at best a duty to consider their position and take “reasonable care”. In deciding what could be expected from a reasonable council in response to the risk that releasing hazard information would impact upon property values, a court must consider:

1. the seriousness of or “magnitude of the risk”, that is if the risk occurs, will the consequences be minor, catastrophic or something in between;
2. the likelihood or “the degree of the probability” that the risk will occur;
3. any “expense, difficulty and inconvenience” that the defendant would face to reduce or illuminate the risk; and
4. “any other conflicting responsibilities which the defendant may have”.

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7 Caltex Refineries (Qld) Pty Ltd v Stavar (2009) 75 NSWLR 649 at [102]-[105] (Allsop P) cited with approval in Makave Pty Ltd v Randwick City Council (2009) 171 LGERA 165; [2009] NSWCA 412 at [103] (Hodgson JA); [93] (Simpson J).
8 Woolcock Street Investments Pty Ltd v CDG Pty Ltd [2004] HCA 16, [74] (McHugh J); citing his own judgment in Perre v Appand (1999) 198 CLR 180 at [105].
9 Western Districts Developments Pty Ltd v Baulkham Hills Shire Council (2009) 75 NSWLR 706.
Only after these issues have been identified and balanced, can a court determine whether or not the defendant council acted reasonably in the circumstances.\(^{10}\)

In the context of this article, the risk that we are considering is the risk that releasing hazard information will cause a fall in property values, not the risk that the land will be affected by the hazard: the issue of new flood maps does not affect the actual risk of flooding, that risk exists whether or not the information is released. To decide whether or not a reasonable council should avoid the economic losses by refusing to release hazard information, the factors, noted above, must be considered.

1. As has been noted, the magnitude of the risk, that is by how much the property value will fall, cannot be determined. Market forces are many and varied and the loss may not be felt for some time.
2. Equally the probability of there being a market loss at all may be hard to quantify, it will vary with each property and with the impact of other market forces.
3. Withholding hazard information would not expose the council to any “expense, difficulty and inconvenience”.
4. The critical consideration for council will be “What other conflicting responsibilities does the council have?”

Council will have a responsibility to the occupier of land: “where a public authority has information which is relevant to the safety of others … it may have a duty to disclose it”\(^{11}\). Information about risk is essential for developing community resilience\(^{12}\) and for personal safety. People cannot adequately prepare for flood, fire or other hazard if they cannot obtain information about their level of risk. Occupiers who do not know that they are at risk may not be adequately prepared, they will not understand that warnings apply to them and so their property, and their lives, may be at risk.

Regardless of the risk to safety, potential purchasers will be at risk of suffering a pure economic loss if they pay more than they should for land that is, unknown to them, subject to a natural hazard such as fire or flood. By the same process of reasoning it can be shown that if council owes a duty not to cause economic losses to the current owners, it must owe a similar duty to the future owners. Again the factors identified by McHugh J can be considered:

1. *Reasonable foreseeability of loss:* If it is true that releasing the hazard map would cause a fall in market value, then it would follow that a purchaser is unaware of this market sensitive information would pay too much for the property. It is therefore reasonably foreseeable that the subsequent purchaser would suffer an economic loss calculated as the difference between what they did pay, and what they would or should have paid had the flood information been available to them.
2. *Indeterminacy of liability:* The potential plaintiffs will be the class of subsequent purchasers of the land. The identity of people in that class cannot be known but the class is reasonably identifiable and limited so indeterminate liability is not an issue.
3. *Autonomy of the individual:* A duty to release the information would not be a duty to restrain an individual.
4. *Vulnerability to risk:* The purchaser will be vulnerable. If the information is withheld no search or request to council for information will reveal it; and
5. *Knowledge of the risk and its magnitude:* If council is aware of the revised hazard information then council has the knowledge that the market may be distorted by the failure to release the information, but again the extent of that distortion may not be known.

As is the case with current owners, these factors would at least permit a finding that a council has a common law duty to warn potential purchasers and developers of the identified risk.

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\(^{10}\) Wyong Shire Council v Shirt (1980) 146 CLR 40 at [14] (Mason J); An application for the High Court to reconsider this decision was rejected in New South Wales v Fahy (2007) 232 CLR 486; [2007] HCA 20.

\(^{11}\) Smith v Eurobodalla Shire Council [2005] NSWCA 89 at [104] (McLellan AJA).

\(^{12}\) COAG, n 1.
Councils also have obligations under statute law to provide information. In New South Wales, Councils are vested with the power to develop Local Environment Plans\(^{13}\) and Development Control Plans\(^{14}\) and are given the authority to approve developments and buildings to ensure many relevant considerations, including risk, are taken into account.\(^{15}\) Purchasers routinely approach councils to obtain information about the land, including details regarding council’s knowledge of the land’s risk exposure. With that degree of knowledge and control of the relevant information along with vulnerability of people who seek information (that is who will be at risk if the information is not provided and who are unable to obtain detailed hazard information from other sources) it is easy to argue, and has been held, that a Council

which follows the practice of supplying information upon which the recipient is likely to rely in circumstances in which it is reasonable for him to do so is under a duty to exercise reasonable care that the information given is correct.\(^{16}\)

Failure by a council to give accurate, or any, information about known risks of slippage,\(^{17}\) exposure to aircraft noise\(^{18}\) and contamination\(^{19}\) has led to liability.

What follows is that a council may owe a duty to landholders not to cause them economic loss but it will owe at least an equal, if not an overriding duty to others to release the information. Given the conflicting responsibilities a court could hold that there is no duty to current owners, or that the issue is to be determined as a question of “breach” and that even if there is a duty to the landowners, the reasonable council would still release the information to meet its obligations to others to whom it owes conflicting duties.

As noted above, there are legislative requirements upon councils to make risk information available.\(^{20}\) Where legislation requires particular action, complying with that legislative obligation cannot be the basis of an action for compensation even when it causes harm.\(^{21}\) A council will not be liable for adverse consequences of an action taken to meet its statutory obligations, such as publishing up to date hazard information, unless its action was “so unreasonable that no authority … could properly consider the act or omission to be a reasonable exercise of its functions”.\(^{22}\)

Further, the legislature has taken steps to protect councils and encourage disclosure. A council is not liable for giving advice, in good faith, about whether or not land is flood prone, subject to coastal erosion,\(^{23}\) or contaminated.\(^{24}\) The concept of “good faith” is discussed in more detail, below.

**Good faith**

Councils are protected for actions taken, and information given with respect to flooding and other risks, provided they have acted “in good faith”. “Good faith” can imply a subjective test where the issue is to be judged by whether or not they acted with honesty of purpose – on this view a person acts

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\(^{13}\) Environmental Planning and Assessment Act 1979 (NSW), Pt 3, Div 4.

\(^{14}\) Environmental Planning and Assessment Act 1979 (NSW), Pt 3, Div 6.

\(^{15}\) Environmental Planning and Assessment Act 1979 (NSW), Pt 4.

\(^{16}\) Wollongong City Council v Fregnan [1982] 1 NSWLR 244. The concept of reliance is discussed further, below.

\(^{17}\) Wollongong City Council v Fregnan [1982] 1 NSWLR 244.


\(^{20}\) For example, see Local Government Act 1993 (NSW), s 733(1) and Environmental Planning and Assessment Act 1979 (NSW), s 146 dealing with flood and fire risk respectively.

\(^{21}\) Vaughan v Webb (1902) 2 SR (NSW) 293; Melaleuca Estate Pty Ltd v Port Stephens Council [2006] NSWCA 31.

\(^{22}\) Civil Liability Act 2002 (NSW), s 43; see also s 43A; similar legislation applies in most Australian jurisdictions.

\(^{23}\) Local Government Act 1993 (NSW), s 733.

\(^{24}\) Environmental Planning and Assessment Act 1979 (NSW), s 145B.
in good faith if they were “honest, albeit careless”\textsuperscript{25} Alternatively “good faith” may imply an objective test – a person acts in good faith if they act with the “caution and diligence to be expected of an honest person of ordinary prudence”.\textsuperscript{26} When considering the statutory immunity for actions relating to flood advice, the Federal Court said:

The statutory concept of “good faith” with which the legislation in this case is concerned calls for more than honest ineptitude. There must be a real attempt by the authority to answer the request for information at least by recourse to the materials available to the authority.\textsuperscript{27}

In \textit{Armidale City Council v Finlayson} [1999] FCA 330, the Council failed to disclose that the land had been subject to long term industrial contamination; contamination that council was well aware of as council staff had worked with the previous owners to ensure remedial action was taken to reduce future chemical spills. The failure to disclose information about the possible contamination of the land did not involve a genuine consideration of the risk. The court found the Council:

simply failed to apply their minds to the question whether the contamination ought to be investigated so as to determine whether it required remediation. They did nothing effective about its implications. No serious attempt was made by the Council to remedy the situation, although effective measures were possible.

In \textit{Port Stephens Shire Council v Booth and Gibson} [2005] NSWCA 323 the Council was aware of the impact of aircraft noise but did not require the developer to take steps to build with appropriate noise abatement measures.\textsuperscript{28} It appeared that council employees discussed it amongst themselves and decided noise abatement did not work and the noise would not worry people who were visiting the developed land for adventure-type holidays. The staff did not make any attempt to consider the actual site or the impact of noise on this development.

In all of these cases the council did not act in good faith. “Good faith” requires more than just an honest attempt. A council acts in “good faith” when providing information if it refers to its records, applies current practice and guidelines and genuinely considers how the information is relevant to the land in question.

Whatever legal duty a council owes, it is not a duty to guarantee that data is accurate; it is a duty to act reasonably in the circumstances. Just because the eventual hazard does not perform as predicted – the flood is higher, or lower, than predicted, or a fire burns out land that was thought not to be bushfire prone and does not damage identified bushfire prone land – does not mean the hazard information was inaccurate or its use was unreasonable. What is reasonable will always be judged in the particular circumstances. It may be reasonable to release information that appears to be well founded but eventually turns out to be wrong; it may also be reasonable to withhold information where there are serious and genuine concerns about its validity, even if it later turns out to be accurate. Again to rely on statutory protections the critical issue will be whether the decision was made “in good faith” A council that is reluctant to release information for fear of affecting property values, and cloaks that decision behind a claim that the information is “doubtful” is not acting in good faith; equally a council that releases information that it believes, or knows, to be wrong in the belief that they cannot be liable for giving advice, is also not acting in “good faith”. Good faith would require a genuine consideration of the information and the material available to determine whether any doubt as to the accuracy of the material was genuinely held, and whether the risk of error was significant.

What follows is that if there is a duty owed to current landowners, it is not a duty to negligently harm them. To release information that has

\textsuperscript{25} \textit{Mid Density Developments Pty Ltd v Rockdale Municipal Council} (1993) 44 FCR 290 at 298 (Gummow, Hill and Drummond JJ).

\textsuperscript{26} \textit{Mid Density Developments Pty Ltd v Rockdale Municipal Council} (1993) 44 FCR 290 at 298 (Gummow, Hill and Drummond JJ).

\textsuperscript{27} \textit{Mid Density Developments Pty Ltd v Rockdale Municipal Council} (1993) 44 FCR 290 at 300 (Gummow, Hill and Drummond JJ).

\textsuperscript{28} This case is discussed in more detail, under the heading “Liability for disclosing misleading information”, below.
been obtained and prepared in accordance with relevant professional standards, with due regard to the potential use of the land and the impact of the forecast risk would not be negligent and would be justified by reference to the council’s conflicting duties to provide accurate information to developers and purchasers and to enhance community safety.

**LIABILITY FOR DISCLOSING INACCURATE INFORMATION**

Between 1999 and 2003 Brisbane City Council commissioned new flood data which indicated that the expected level of a 1 in 100-year flood would be between 1m and 3 m higher than that used in Council’s planning documents. The Council refused to release the new flood data. In evidence to the Queensland Crime and Corruption Commission, and in press reports, the fear of liability was raised as one reason why material was not disclosed.

Closer examination of the Crime and Corruption Commission report shows that Council was not concerned that releasing flood maps would lower property values per se, they were concerned about releasing these flood maps in circumstances where they were not satisfied that the results being reported were accurate. After seeking further expert advice and reviewing the report and the methodology used, it was concluded that the reports were inaccurate and that flood levels would be lower or the same as those calculated in 1984 and which formed the basis of land use planning. Had Council released the report when it was first obtained, there could have been adverse economic impacts leaving property owners aggrieved when it turned out that the reports were inaccurate and predicted flood levels would not be as high as initially forecast.

Even if information is accurate when it is released, circumstances change and councils must keep their information up to date and take account of changes in science and land use. In an action for negligence a person affected by hazard information may argue that council’s information was out of date and council is negligent for not updating the material. Again civil liability legislation will provide some comfort. First spending money on updating information is one of the many calls on a council’s budget. In deciding whether or not a council acted reasonably a court must consider all the functions of the council. That is, the question is not whether a reasonable council would have spent money on updating information, but whether a reasonable council with all the various obligations that the defendant has, acted unreasonably in not updating information. Equally a plaintiff cannot bring an action alleging that the decision by council to allocate money to upgrading the library should have been spent on upgrading fire hazard maps or databases.

These provisions do not allow councils to decide that having produced a hazard map no further action is required. Questions as to when and how risk information should be updated will generally be left to council provided they can demonstrate that they did, in good faith, have a plan to review and update material. This means that different councils will have different obligations, a small council without significant population growth and a stable land mass may well be justified in adopting a long period of review, whereas a council with a growing population affected by coastal erosion or significant bushland development may need to update information more regularly. The key to being able to rely on the provisions in the civil liability legislation is to show that council acted in “good faith”, discussed above.

**LIABILITY FOR DISCLOSING MISLEADING INFORMATION**

A council can be liable for providing information that is accurate, but misleading. In *Port Stephens Shire Council v Booth and Gibson* the Council accurately disclosed that the land in question could be

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29 Civil Liability Act 2002 (NSW), s 50.
32 Civil Liability Act 2002 (NSW), s 42(c).
33 Civil Liability Act 2002 (NSW), s 42.
affected by aircraft noise as it did fall within the Airport Noise Exposure Forecast (ANEF) 20 contour, in fact the property was within the ANEF 25 contour. It was accurate to say it fell within the ANEF 20 contour, in the same way that it would be accurate to say that “the peak of Mount Everest is within the sea level contour”; it is accurate, but misleading. In the context of this case, all property in the 25, 30 and 40 contour also fell within the 20 contour, but the impact of noise was much greater the higher the contour. Purchasers could, and did, assume from, the way the certificate was worded, that the ANEF 20 contour reflected the highest noise to which the property would be exposed. Council could have forewarned purchasers by either properly identifying that the property was within ANEF 25 or, at least, within “ANEF 20 or higher”. In fact Council policy said that they would identify the relevant contour, but they did not do so.

The cases discussed here may be examples where council staff took the view that the less said the better. Whilst not suggested in the judgment it can be imagined that the council staff in Port Stephens took the view that saying that the land was within ANEF 20 was accurate but trying to specify if it was within a higher zone could lead to error and liability. One might imagine that the Armidale Council thought that disclosing the risk of contamination may lead to issues arising from the way council had managed the hazardous industry that had been allowed to operate on the site. In cases like Port Stephens Shire Council v Booth and Gibson [2005] NSWCA 323 or Mid Density Developments Pty Ltd v Rockdale Municipal Council (1993) 44 FCR 290 it might have been thought that “standard” answers were best, on the view that if one “follows the standard procedures” then no liability can attach, but that is clearly not the case. Deliberately withholding information or failing to make enquiries in the hope of reducing exposure to liability would not be reasonable nor would it be making a decision in “good faith”.

CONCLUSION

Councils are required to make decisions according to law but they should not make decisions simply for fear that someone may take them to court to seek a review of that decision. All decisions carry some legal risk but the analysis here shows that the risk of releasing reasonably accurate hazard information in a planned way is less than the risk of deliberately withholding it. That does not mean that councils should release inaccurate or irrelevant information, rather they need to make information available in a careful way, with due consideration of how the information will be used and by whom. Councils need to develop a policy that explains how they will deal with requests for hazard information and then apply that policy.

In the cases reviewed here liability has been established when council staff simply did not turn their mind to the relevant risk and how it might affect the relevant property, and where council had a policy that they failed to apply. It is interesting to again note that there are no cases where anyone has successfully sued a council for releasing up to date, accurate hazard information.

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36 See Port Stephens Shire Council v Booth and Gibson (2005) 148 LGERA 351; [2005] NSWCA 323; in that case council policy said they would disclose when a property was within ANEF 25 but they simply did not do that.