

SUBMISSION to QUEENSLAND FLOOD INQUIRY.

Professor Bill Duncan

Professor Sharon Christensen

Faculty of Law ,Queensland University of Technology

Introduction

We are both Professors of Property Law at the Queensland University of Technology specialising in all types of land transactions including sales, leasing and mortgages. A short curriculum vitae is attached to this submission. We have been following the progress of Stage 1 of the Inquiry and have deliberately withheld making any submission until this time awaiting the early recommendations. We note that the second stage of the Inquiry will focus on insurance and land planning. Our particular interest is in pre-transactional disclosure to buyers, lessees and mortgagees of information relating to the land which may affect its use and value.

The Issue

Experts suggest that governments need to better inform the public of risks of particular natural hazards in their region.¹ The question is how this might be done as accurately and efficiently as possible within the existing resource base of government, which includes local government. In a real sense, any government is a true “information monopolist” in respect of the area it governs in that much valuable data is acquired by government agencies for different reasons, some by virtue of a statutory duty to do so and other information acquired in the discharge of its diverse functions.² Any person acquiring an interest in land either as owner, occupier or by way of mortgage or charge, in making their decision to proceed with their transaction, be fully informed as to the risks associated with the holding of their interest.

The known risks associated with severe adverse weather conditions, particularly causing inundation and erosion, are often not capable of being insured against either at all or if so capable, not at an economically viable premium rate, so the person with the interest

¹ Jonathon Nott, “Washed away-people and buildings during tropical cyclones: are Queensland State and local government policies doing enough?” (2004) 21 EPLJ 227 at 238.

² S. Christensen W Duncan and A Stickley, “Shifting Paradigms of Government Liability for Inaccurate Information” (2008) 15 E-Law Journal (No 2) 185.

effectively becomes a self insurer of that interest in the property. It is appropriate that this factor be fully understood as one of the incidents of property ownership in those areas affected by such weather influences. However, this does not address the issue of how a person intending to deal with the land becomes aware of the risk involved in ownership, or as a lessee or mortgagee.

How should those who end up as being self insured against these risks be made aware of that fact so that they might lessen the impact of any calamity, or even make a rational decision, based upon evidence, not to proceed with the particular transaction contemplated or to proceed with it upon more favourable conditions? We suggest that some form of compulsory disclosure of this should be made at a point just prior to entry into a transaction affecting the land.

The Current Position in Queensland with respect to Owner Disclosure in Land Transactions

Unlike other States and Territories,³ Queensland has no coherent and integrated seller disclosure regime for residential property. A limited disclosure regime is established for the sale of lots in a community titles scheme pursuant to Chapter 5 of the Body Corporate and Community Management Act 1997 in relation to existing registered lots and lots being purchased off the plan, but this largely concerns issues arising from the management of the body corporate including the amount of levies, the extent of the body corporate assets, bylaws and agreements between the body corporate and third parties. There is no provision within this statutory regime for the seller to disclose insurance details of the body corporate or the extent to which the lots and the common property may have been adversely affected by flooding or other severe weather events. Fragmented seller disclosure is imposed by a disparate range of statutes, overseen by different State government departments, and requiring disclosure of a range of matters including whether or not the land is on the Contaminated Land Register,⁴ whether residential property is fitted with safety switches,⁵ whether or not residential premises have been fitted with smoke alarms,⁶ whether the

³ The only other State with no integrated seller disclosure regime is Western Australia.

⁴ *Environmental Protection Act 1994*, s 421.

⁵ *Electrical Safety Regulation 2002*, reg 77.

⁶ *Fire and Rescue Service Act 1990*, s104RA.

property holds a pool safety certificate,⁷ the existence of orders concerning trees on the property⁸ and certain disclosures concerning the area, contours and configuration of unregistered land under the *Land Sales Act 1984*. Apart from these statutory obligations to disclose, the only other matters which are disclosed are done so under the Standard REIQ Contracts or in the case of sales off the plan by way of seller customised contracts, both of which can be varied by the parties as they see fit to agree.

Comparison with other Jurisdictions particularly New South Wales

This is in stark contrast to the regimes in other States and Territories where there are significant statutory obligations to disclose not only matters of title, but also matters of quality of title at the time of contracting.⁹ This is particularly the case in New South Wales where there is a statutory framework¹⁰ creating an obligation to certify at the request of a person, (for any purpose) whether or not land is subject to flood related development controls. This forms part of a much wider disclosure incorporated in a Certificate issued pursuant to s 149 of the *Environmental Planning and Assessment Act 1979* (NSW), which must be attached¹¹ to all contracts of sale of land before the contract is signed by the buyer,¹² failing which a buyer may rescind the contract.¹³ The information provided in that Certificate is given within a strict statutory framework for a specifically declared purpose and misstatements causing loss are prima facie actionable, subject to the qualifications, and the operation of any disclaimer appearing upon the face of the Certificate itself in any particular instance.¹⁴ Given the avenues available for seeking “official information” and the consequences attending a failure to provide it, and the further consequences of the information revealing an adverse matter, there is some incentive for the authorities to maintain accurate records and to access them with care.¹⁵

⁷ *Building Act 1975*, s 246ATF.

⁸ *Neighbourhood Disputes Resolution Act 2011*, s 83 (passed on 2 August 2011 to commence on proclamation).

⁹ For details see, Christensen, Duncan and Stickley, Evaluating information disclosure to buyers of real estate –useful or merely adding to the confusion or expense?”(2007) 7 Queensland University of Technology Law and Justice Journal 148

¹⁰ *Environmental Planning and Assessment Act 1979* (NSW), s 149 (planning certificate):*Environmental Planning and Assessment Regulation 2000* (NSW) Cl 7A (flood related development control information).

¹¹ *Conveyancing (Sale of Land) Regulation 2010* (NSW), Cl 4

¹² *Conveyancing Act 1919*(NSW),s 52A(2)

¹³ *Conveyancing (Sale of Land) Regulation 2010* (NSW), Cl 16(1)(a)(There are limitations upon the right of rescission, e.g. the buyer must have been unaware of the existence of the matter at the date of contract or the buyer would not have entered the contract if the buyer knew of the defect,(Cl. 16(3))

¹⁴ *Burke v Forbes Shire Council* (1987) 63 LGRA 1 at 17 per Allen J

¹⁵ *Mid Density Developments Pty Ltd v Rockdale Municipal Council* (1993) 44 FCR 290

Obligation of authorities to maintain flood information in Queensland

There are obligations upon local governments in Queensland to obtain information concerning flooding (and other hazards) within their jurisdiction and to maintain proper records of those facts for a variety of future applications, principally when considering development applications.

First a local government is required by the State Planning Policy¹⁶ to identify within its planning scheme ‘natural hazard management areas’ affected by a range of hazards, including flooding, within which minimising risks to the community should be a key consideration in development assessment and the preparation of planning schemes. When assessing development within a natural hazard management area the development must be compatible with the nature of the hazard, minimise the impact of the hazard, not create an unacceptable risk to people or property and community infrastructure within the development must be designed to function effectively in a hazard event.

Secondly, under s 724(1)(zb) of the *Sustainable Planning Act 2009* (Qld), a local authority must maintain for inspection its register of resolutions about land liable to flooding made under the *Building Act 1975* (Qld). Under s 32(1)(b) of the *Building Act 1975* a local government may make or amend provision of a local law or planning scheme or a resolution about an aspect of, or matter related or incidental to, building work prescribed under a regulation, for example, that the land is liable to flooding.

These provisions require records of flooding and other hazardous events to be maintained and are consulted in relation to development applications. However, compensation is not payable by the local authority to the owner or any other person with an interest in the land if a change to the planning scheme or any planning scheme policy affecting the land affects development that, had it happened under a superseded planning scheme, it would have led to significant risk to persons or property from natural processes (including flooding, land slippage or erosion) and the risk could not have been significantly reduced by conditions attached to a development approval.¹⁷

¹⁶ State Planning Policy 1/03, *Mitigating the Adverse Impacts of Flood, Bushfire and Landslide*.

¹⁷ *Sustainable Planning Act 2009* (Qld), s 706(1)(i) (i)

Where information concerning flood levels exists and informs the requirements of a development application, the keeper of the flood information must assume the purpose for which the information is required and act accordingly.¹⁸ Upon the occasion of assessing land for development or redevelopment, a local authority in possession of flooding information as part of the process of approval, knowing the likely impact of flooding upon a development must take that factor into account where development is within a natural hazard management area. A similar duty was held to rest upon a local authority assessing a rezoning application of land from industrial to residential in circumstances where the authority was aware that the land was unsuitable for rezoning to residential because of the presence of contamination.¹⁹ In finding the local authority liable for not taking the contamination into account, apart from a statutory duty to “take into account whether the land was unsuitable for redevelopment because of some risk”, the authority would have otherwise had a duty by the fact that it held all the records of the previous use of the land and an appreciation that by reason of its previous use that it would have been contaminated. None of this information was readily available to the applicant for the rezoning.²⁰ The same principle would apply to flooding records.

The aim of the planning legislation examined is to ensure local governments have sufficient information to regulate development and minimise liability arising from foreseeable risks, include extreme natural hazard events. There is no obligation on a local government to share this information with prospective buyers, lessees or mortgagees.

Proposals with respect to flooding information

The Commission itself has made a recommendation with respect to making the public aware of what might be loosely termed “flooding information” as it affects property. The recommendation is contained in para 4.13 and reads

Councils should ensure that residents and businesses can clearly understand the impact of predicted flood levels on their property. This may include one or more of the following methods:

¹⁸ *Brown v Heathcote County Council* [1987] 1 NZLR 720 at 725-726 per Lord Templeman (PC)

¹⁹ *Alec Finlayson Pty Ltd v Armidale City Council* (1994) 51 FCR 378

²⁰ *Ibid* at 402 per Burchett J. The duty would not arise where the authority did not possess the information -it has no duty to undertake research; *Dancorp Developers Ltd v Auckland City Council* [1991] 3 NZLR 337

- information on rates notices about flooding at individual properties
- geospatial mapping, available to the public, that depicts inundation at certain river heights
- flood markers
- flood flag maps and floodwise property reports
- colour coded maps
- information that relates gauge heights with the level of flooding to be expected at a property

We also refer to the recommendation of the Insurance Council of Australia submission of 4 April 2011 to this Inquiry at paragraphs 232.5 and 232.6 which states, in paraphrase, that “local government should include a statement of flood risk in each rate notice for flood prone properties”

It is our submission that these recommendations should go further and require disclosure of this information not only to existing owners, but to buyers of property at the point of sale. Fully informed prevention is better than cure. At present, there is no compulsion upon local governments to provide this information to prospective owners, nor is there any statutory specification of the minimum requirements for such information. Moreover, there is no obligation upon an owner about to deal with the land by sale, lease or by giving a mortgage to make any disclosure of this information prior to the third party becoming bound by the particular instrument which evidences the transaction.

For this to occur proper search parameters would have to be established by statute, a suitable form developed to accommodate the information with appropriate disclaimers or a general statutory “good faith” type disclaimer, as in New South Wales, be adopted given the nature of flooding information. The information would have to be available in a similar form (such as geospatial mapping) for all local governments.

It is conceded that accurate flood mapping is not easy given the endless set of variables involved in any one event, the changes in topography since the previous major event and the differing interpretations of the data by experts. However, risk in certain defined areas should be capable of intelligible measurement particularly if those areas are known flood plains or are riparian land contiguous to a river which is known to flood. These areas should be defined according to the severity of past events and the building controls which may have now been placed upon them. For consistency, it would behove the government to declare certain areas as “flood prone areas” (or other designation – in New South Wales “subject to flood related

development controls”) based upon past flooding history and future modelling so that any third party dealing with the land is fully apprised of the potential affect upon the land by severe adverse weather events.

Existing protection for residential buyers in Queensland pre settlement

Whilst there is no pre-contractual, mandated disclosure of flooding in Queensland there is limited protection for buyers of dwelling houses if a severe weather event or natural disaster occurs between contract and settlement. Section 64 of the *Property Law Act 1974* gives buyers of dwelling houses a right to terminate a contract of sale where a dwelling house becomes unfit for habitation because of damage or destruction after contract and before settlement. This could occur through flooding or some other natural disaster. However, at present the expression “unfit for habitation as a dwelling house” is unclear and may give rise to argument. Does it mean “unfit” immediately after the event or at the date of settlement? Secondly, the section only applies to dwelling houses and residential lots in Community Titles Schemes, but not common property. Is a “lot” in a Community Titles Scheme unfit for occupation if all or part of the common property is flooded? The section does not apply to non-residential property. Thirdly, it does not apply to lessees or mortgagees who may also be adversely impacted by a flooding event if it occurs after the agreement for lease or the loan agreement has been entered, but before either of those transactions have been finalised by entry into possession or the making of the funds available.

While the section provides a mechanism for buyer’s to escape a contract in the event of damage arising from a natural disaster, it does not assist a buyer who has completed a contract ignorant of the potential risks who later suffers a loss.

Conclusion

This submission is posited upon the notion that persons seeking to gain an interest in land should be fully informed up front as to matters adversely impacting on the use and value of the property, including the possible risks from severe adverse weather events, principally flooding (but also beach erosion) before they become bound to proceed. They can then make

a proper judgment as to whether to proceed and upon what conditions. Despite the various means of insuring the population against the effects of natural disasters (eg. by state paid premiums, government sponsored natural disaster funds, opt in pot out schemes),²¹ it is likely that a fair proportion of the population will remain uninsured or only partially insured into the future. If a person accepts risk of loss themselves, it should only be as a result of the person being fully informed of the likelihood of the risk. It therefore also our submission that a framework for the disclosure of adverse impacts on property to be purchased, leased or mortgaged should be undertaken as part of a comprehensive consumer protection framework requiring seller disclosure prior to contract. A purchaser who is provided with all relevant information relating to a property and provided a reasonable time to consider it, and seek legal advice if they choose, is able to make an informed decision whether to buy the property and at what price.

We would be pleased to attend the Commission in person to elaborate upon my recommendations if required to do so upon reasonable notice being given

²¹ See Natural Disaster Insurance Review, June 2011 (ISBN 9780642747099), Commonwealth of Australia), Appendix 4.