



Disclosing Hazard Information: **The Legal Issues**



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Executive Summary

Western Australia's vast and diverse environments mean that a wide range of natural hazards pose significant threats to communities across the state. Having a greater awareness and understanding of these hazards is key to helping communities better prepare and become more resilient to hazards. Nevertheless, some Local Governments have been reluctant to release hazard information, fearful that doing so may affect property values and therein expose to Local Governments to legal claims of 'pure economic loss'. This paper discusses the legal issues surrounding the disclosure of hazard information.

In the broader context, for a legal claim of 'pure economic loss' to be successful, a plaintiff would firstly have to demonstrate that a Local Government owed them a duty of care, secondly, that they had breached their duty of care by acting unreasonably and this failure had directly led to the plaintiff suffering an economic loss. As this paper discusses, whilst a Local Government *may* owe a duty, this duty is at the very least arguable and will depend very much on the circumstances of a particular case. Even so, it is not a duty to protect an existing land owner's interest above all other interests. Rather the duty of Local Government is to exercise reasonable care in gathering and disclosing information, taking into account the magnitude of the risk, its likelihood of its occurring, the expense and difficulty of highlighting or mitigating the risk, and any other conflicting responsibilities a Local Government may have.

Included amongst its statutory responsibilities, the *Emergency Management Act 2005* requires Local Government to make effective emergency management arrangements. Additionally, the *Planning and Development Act 2005*, requires Local Government to give due regard to State Planning Policies (SPP) when undertaking planning considerations and in determining development applications, to consider the suitability of the land for the development taking into account the possible risk. Accordingly in fulfilling these statutory obligations but also in undertaking wider duties, Local Governments are likely to acquire hazard information. Having gathered such information, it is likely that a Local Government will have a statutory duty to disclose such information following upon request. Even in instances where there may be no statutory duty to disclose information, a Local Government may, in exercising or discharging a reasonable duty of care, be obliged to disclose information that is of obvious importance to the recipient in their decision making process. Having established that a Local Government may be in possession of hazard information, it is important to note that there has been no successful legal action brought against a Local Government for the release of reasonably accurate and up to date hazard information.

When providing information, Local Governments will need to ensure that reasonable care has been taken to ensure the accuracy of the information provided; even if the information request was made in an informal manner. In addition, when disclosing hazard information, Local Government should seek to ensure that the information is not misleading or misrepresentative of the risk posed by a hazard. Further, given the predictive nature of hazard information, consideration should be given to how hazard information will be maintained. For these reasons, Local Governments are advised to consider developing a policy and procedures dealing with the management of information.

Disseminating hazard information effectively is a critical component of hazard mitigation that helps to ensure that communities are aware of the risks they face. Moreover, there is no legal impediment to releasing reasonably accurate hazard information. Yet, on the contrary, the failure to not use, or disclose hazard information once it has been gathered, could attract various forms of liability.

Amongst the options available for the dissemination of information, the provisions of the *Transfer of Land Act* allow Local Governments to place a notice on a certificate of title alerting property owners of a potential hazard. The provisions of the *Planning and Development Act* only provide for the WA Planning Commission to place a notification on title at the subdivision stage of development. Therefore, with this regard Local Governments are encouraged to consider the guidance contained within State Planning Policies. Of these, only *SPP2.6 State Coastal Planning* and *SPP3.7 Planning in Bushfire Prone Areas* provide clear guidance, stating that where a hazard has been identified, a notification 'should' be placed on title alerting current and future land owners of a hazard.

1.0 Introduction

Every year, communities across Western Australia (WA) face devastating losses caused by emergency events. Natural hazards such as bushfires, floods and cyclones as well as man-made emergency events can have significant consequences with impacts affecting the community, economy, environment and infrastructure. Western Australia's vast and diverse communities, landscapes and climatic conditions mean that the State will continually be at risk from natural hazards. Further, climate change, together with an increasing population and an expanding urban-rural fringe is likely to increase the frequency and severity of the hazards affecting the community.

Information is fundamental to understanding both natural and manmade hazards and ensuring that communities are able to prepare and make fully informed decisions about the risks they face. Indeed, the community has both the right and the responsibility to be informed about risks which require action.¹ Yet despite this, some Local Governments have been cautious about releasing hazard information for fear of being exposed to legal liabilities. These concerns have perhaps been driven by the fear that Local Government could be liable for releasing information and/or adopting land use planning controls that have an impact upon property values or restrict development that otherwise may occur without such controls in place. Some concerns also persist about the potential for liability arising from disseminating inaccurate or misleading information.

On the basis of these concerns, in 2015 WALGA's State Council resolved that the Association further investigate liability implications for Local Government arising from the management of natural hazards. Accordingly, the purpose of this paper is to examine the legal issues concerning the disclosure of hazard related information by Local Government.

This report is primarily based on the findings of Michael Eburn and John Handmer's paper, '*Legal issues and information on natural hazards*' and the presentations made by Dr Eburn to WALGA members in November 2015 concerning the disclosure of hazard information.

¹ Philip Hall (2007) *The Australian Journal of Emergency Management*, Vol. 22 No. 2, Early Warning Systems: reframing the discussion

2.0 Legal Issues

In short, the legal issue examined here is whether or not:

The disclosure of hazard information by Local Government, (which may lower property values) would expose Local Government to successful legal claims of ‘pure economic loss’ from those affected property owners seeking to recover their financial losses.

2.1 Negligence and Duty of Care

As England notes, *“the tort of negligence provides a remedy for a person’s failure to take care not to injure someone else. It provides a remedy for damage to the person (whereas nuisance provides a remedy for damage to property).”*²

In order to establish negligence, a plaintiff would firstly have to demonstrate that a duty of care was owed to them by the defendant. In the context of this paper, the plaintiff would have to demonstrate that a Local Government owed them a duty of care and that they had breached this duty of care by undertaking, or failing to undertake, an action(s) contrary to those that of a reasonable Local Government would have undertaken, or not. Secondly, it would also have to be demonstrated that the failure to act reasonably had directly caused the plaintiff to suffer a damages and in particular, economic loss. Even if these conditions can be satisfied, a duty of care cannot be inconsistent with a requirement set by a statute. Further, even if there is a duty of care, the law requires only that ‘reasonable care’ to be undertaken in discharging the duty of care, not a guarantee that no harm will arise.

It is important to recognise that the release of information does not damage or alter the property in any physical way. A plaintiff’s potential loss, if any, is simply a financial loss that is only realised at the point of a property transaction (e.g. sale or refinancing) and not upon the release of the information. However, many factors combine to influence property values. Therefore directly attributing an economic loss to the release of hazard information specifically, is not only difficult, but it becomes increasingly more problematic as time passes from the release of the information. Indeed, at some point in the future it may be that there is no loss, let alone a loss that can be reasonably quantified. For these reasons, courts have been reluctant to allow claims for pure economic loss, as best summarised in *Woolcock Street Investments Pty Ltd v CDG Pty Ltd* *“claims for damages for pure economic loss present peculiar difficulty. Competition is the hallmark of most forms of commercial activity in*

² England, P (2007) *Climate Change: What are Local Governments Liable for?* Griffith University

Australia”.³ The Courts will take into consideration a range of factors in determining the existence of a duty of care; in particular the proximity of the relationship between the parties. Another crucial issue involving the establishment of a duty of care, is the need to demonstrate vulnerability. Vulnerability is characterised as the plaintiff’s inability to protect itself from the consequences of a defendant’s want of reasonable care either entirely or at least in a way which would cast the consequences of loss on the defendant.⁴

The only clear conclusion that can be drawn is that whilst Local Government may owe a duty, the extent of any duty of care is at the very least arguable. Whether a Local Government did owe a plaintiff a duty of care would depend very much upon the circumstances of a particular case. Even so, any duty is not a duty to protect an existing land owner’s interest above all else.

The general principles of a ‘duty of care’ as set by Section 5B Civil Liability Act are that “*a person is not liable for harm caused by that person’s fault in failing to take precautions against a risk of harm unless –*

- a) *the risk was foreseeable (that is, it is a risk of which the person knew or ought to have known); and*
- b) *the risk was not insignificant; and*
- c) *in the circumstances, a reasonable person in the person’s position would have taken those precautions.”*⁵

Eburn and Handmer⁶ suggests that it is a duty to take reasonable care and in assessing this courts will consider the following:

1. The magnitude or seriousness of the risk – the level of consequence should something arise.
2. The probability or likelihood of the risk occurring.
3. The ‘expense, difficulty and inconvenience’ of reducing or highlighting the risk.
4. Any other conflicting responsibilities.

In examining how a ‘reasonable’ Local Government may contemplate these four questions when considering the release of hazard information, it is important to note that questions

³ Woolcock Street Investments Pty Ltd v CDG Pty Ltd (2004) High Court of Australia 16, GLEESON CJ, GUMMOW, HAYNE and HEYDON JJ

⁴ Ibid

⁵ Civil Liability Act 2002

⁶ Eburn, M and Handmer, J (2012) ‘Legal Issues and Information on Natural Hazards’. *Local Government Law Journal* 17, 19-26

relating to the magnitude and likelihood of property values falling cannot be determined given that property values are governed by wider market forces. Additionally a Local Government would not suffer any expense, difficulty or inconvenience if it withheld any information that it held. Therefore, alongside all other relevant considerations, the two key considerations that the courts will examine will be;

- What are the statutory responsibilities that need to be fulfilled?
- What other conflicting responsibilities does a Local Government have?

2.2 Statutory Duties

Having ascertained that the ‘statutory duties’ and ‘conflicting responsibilities’ of Local Governments are crucial to determining whether a Local Government has acted reasonably in the context of releasing hazard information, it is important to identify what these duties may be.

Section 36 (a) of the *Emergency Management Act (2005)* states that “*it is a function of a local government...to ensure that effective local emergency management arrangements are prepared and maintained for its district.*” Section 41 of the Act requires Local Governments to prepare emergency management arrangements which set out “*a description of emergencies that are likely to occur in the local government district*”. Further, the provisions of the Act require these arrangements to be made available for inspection by members of the public.⁷

Section 77 of the *Planning and Development Act (2005)* requires Local Governments in preparing or amending a local planning scheme to a) “*have due regard to any State planning policy which affects its district*”. This includes *SPP 3.4, Natural Hazards and Disasters* which itself states that “*Local Governments must have regard to this policy in the preparation or amendment of town planning schemes, strategies and policies, and when providing comment and advice that deal with applications that may be affected by natural hazards.*”⁸

Likewise, when under taking land use planning decisions, Local Governments are required to give due regard to *SPP2.6, Coastal Planning* and *SPP3.7 Planning in Bushfire Prone Areas*. In addition, the State Government has set mandatory planning and building

⁷ Emergency Management Act 2005

⁸ WA Planning Commission (2006) *SPP 3.4 Natural Hazards and Disasters*

requirements to govern development in those areas identified by the State Government as being a bushfire prone area.

Clause 67 of the *Local Planning Scheme Regulations (2015)* requires Local Governments, in considering development applications to have due regard to the following matters (amongst others) *“to the extent that, in the opinion of the local government, those matters are relevant to the development the subject of the application:*

(q) the suitability of the land for the development taking into account the possible risk of flooding, tidal inundation, subsidence, landslip, bush fire, soil erosion, land degradation or any other risk;

(r) the suitability of the land for the development taking into account the possible risk to human health or safety;

*(m) the compatibility of the development with its setting including the relationship of the development to development on adjoining land or on other land in the locality including, but not limited to, the likely effect of the height, bulk, scale, orientation and appearance of the development;*⁹

This raises the question about what is required in giving ‘due regard’. In legal advice provided to the Association, Freehills suggest that is a *“Local Government’s subjective discretion as to which matters are relevant to a development or use, provided that is not ‘manifestly unreasonable’.”*¹⁰ What will be relevant to any particular development or use will depend on the particular circumstances of the case. In reviewing relevant WA Supreme Court and State Administrative Tribunal (SAT) cases Freehills go on to suggest that ‘due regard’;

- *“requires more than ‘mere advertence’ to the relevant matter;*
- *due regard is not left to a decision-maker to subjectively determine a matter’s weight as they consider appropriate. Rather, the weight to be assigned depends on the nature of the matter in question. If it is ‘highly material’ to the decision then it must be given weight as a ‘fundamental element’. If the matter was of marginal relevance to*

⁹ State of Western Australia (2015) Planning and Development (Local Planning Schemes) Regulations

¹⁰ Freehills (2010) Climate Change Policy Legal Risks www.walgaclimatechange.com.au/announcements/local-governments-and-coastal-land-use-planning

the decision then the weight to be assigned would not be that of a fundamental element and the requirement would be to 'merely consider' the matter;

- *the matter of weight assigned by a decision maker would not involve an error of law unless the decision-maker gave inordinate weight to a consideration of relatively little importance or very little weight to a consideration warranting very great importance, such that it was 'manifestly unreasonable';*
- *there is a failure to have due regard if in applying a policy instrument its terms were sufficiently misconstrued or its purposes misunderstood; and*
- *the weight given to a considered matter does not prevent departure from it."*¹¹

It is worth noting that one of the possible options available to decision makers in reaching reasonable decisions and having given due regard to all relevant matters is, to do nothing. Indeed, inquiries into a breach of a duty of care *"must attempt to answer what response a reasonable person, confronted with a foreseeable risk of injury, would have made to that risk. And one of the possible answers to that inquiry must be "nothing"."*¹²

Accordingly, in fulfilling a Local Government's statutory duties by satisfying the provisions of the Emergency Management Act and by giving due regard to State Planning Policies as required under the Planning and Development Act, Local Government may acquire hazard information. Alternatively, having given due regard and properly considered state planning policies as part of planning scheme for example, a Local Government may decide that it is reasonable to undertake no action. What is clear, is that to avoid legal challenges regarding decisions, the reasons for arriving at that decision must be made clear, documented and evidence based.

2.3 Liability for Disclosing Risk Information

Potential purchasers often approach Local Governments seeking information about land and buildings, including whether a Local Government has any information about the vulnerability of property to hazards. This may include information about past land activities and uses which may render the property potentially hazardous to future uses and occupiers. Further, Local Government, alongside other Government agencies are likely to be the primary and in many instances, the only source of information requested.

This raises questions about a Local Government's duty to potential purchasers. If by the same reasoning as set out above, a Local Government *may* owe a duty to disclose reasonably accurate hazard information, the same duty also applies equally to potential

¹¹ Ibid

¹² Vairy v Wyong Shire Council (2005) 223 CLR 422, [124] (Hayne J) www.austlii.edu.au/au/cases/cth/HCA/2005/62.html

property owners. This means that Local Governments have a corresponding duty to ensure that potential purchasers are not subject to an economic loss that may arise if they were to pay more than the true value of a property by virtue of a hazard(s) that the property may be subject to.

Local Government will need to be mindful about how information is presented and properly qualify any statement expressed, particularly if the information might be used for a 'serious purpose' such as purchasing property and therefore is likely to be influential in an important decision making process.¹³

In considering whether a public authority may be held liable for negligence, a court is likely to examine the following:

- Whether there is a statutory duty to provide the information.
- Whether the information has been provided formally without a duty to provide such information.
- If the information is provided formally or informally upon request.
- If the information provided upon request is predictive in nature.

2.3.1 Statutory Duty to Provide Information

Section 5.94 of the Local Government Act 1995, provides for persons to be able to inspect a wide range of Local Government information. Further, the provisions of the Freedom of Information Act 1992 provides persons with greater access to Local Government documents and information. Indeed, one of the objects of the Freedom of Information Act is *"to ensure that personal information held by State and local governments is accurate, complete, up to date and not misleading"*¹⁴

¹³ Sved v Woollahra Municipal Council (1995) 86 LGERA cited in Christensen, Duncan and Stickley (2008) *Shifting Paradigms of Government Liability for Inaccurate Information*. eLaw Journal, 15(2), pp. 185-211

¹⁴ Freedom of Information Act 1992

Case Study

Mid Density Developments Pty Ltd v Rockdale Municipal Council: Council provided flooding information in a statutory certificate. The officer responsible for providing the information did so on the basis of their personal knowledge and did not check the Council's official records. Subdivision approval was given subject to flood conditions which would have made the development unprofitable. The courts found the Local Government liable in negligence, observing that the essence of the purchaser's case was that the standard procedures laid down for the retrieval of information, as stated on the certificate, had not been followed and therefore the disclaimer was invalid.

Learning: This case highlights the importance of ensuring that systematic procedures are in place to deal with information requests and secondly ensuring that these procedures are duly followed.

In other instances, despite there being no statutory duty to do so, a Local Government may by way of a duty of care, be obliged to disclose information that is of obvious importance to the recipient in their decision making process. Such cases have arisen where property purchases have sought information from Local Governments about the suitability of land prior to purchase.

Case Study

Alec Finlayson v Armidale City Council: the court found that as the history of the site and its likely contamination was well known to the council, it had been negligent in approving subdivision and then providing development approval despite knowing that the land was significantly contaminated. The failure to consider the contamination of the land and in so doing failing to either, refuse the application or to approve the development subject to remediation conditions breached the duty of care owed to the applicant.¹⁵

In these two case studies, the Local Governments were found to have failed to act in 'good faith'. In order to act in 'good faith', a Local Government, in providing information will need to ensure that it properly checks its records and considers how this information relates to the land and its possible use. The duty does not mean that the information supplied by a Local Government has to be guaranteed as being 100% accurate, rather the duty is to act reasonably. For instance, because the extent of a hazard was different to that predicted, the flood waters were higher, or the bushfire covered a larger area than predicted, does not

¹⁵ Alec Finlayson Pty Ltd v Armidale City Council [1997] FCA 1517 (31 December 1997) www.austlii.edu.au/cgi-bin/sinodisp/au/cases/cth/FCA/1997/1517.html

mean that the information was inaccurate, nor was its use unreasonable. What is reasonable will depend on the particular situation. It may be considered reasonable to release information that eventually turns out to be wrong, or alternatively where there are serious and genuine concerns about the accuracy of the hazard information, it may be reasonable to withhold its release. In the eyes of the Courts, the question is ‘was the decision at the time it was made, reasonable?’

‘Good faith’ entails that the Local Government acted reasonably and genuinely considered the information and its accuracy prior to the publication of the information. A decision to withhold hazard information for fear of lowering property values whilst citing other reasons for withholding the information, such as the accuracy of the information, would not be an act of good faith. Likewise it would not be ‘act of good faith’ to release information if a Local Government had doubts about its accuracy. As discussed in section 2.1, the duty owed to current and prospective land owners is not a duty to protect their economic interests, rather it is a duty to act reasonably and to not negligently cause harm.

Section 5X of the Civil Liability Act provides a ‘policy defence’ whereby ‘in a claim for damages for harm caused by the fault of a public body in the performance or non-performance of a public function, a policy decision cannot be used to support a finding that the defendant was at fault unless the decision was so unreasonable’.¹⁶

2.3.2 The provision of information beyond a Local Government’s official record

The issue of whether a Local Government should go beyond its official records in responding to information requests will depend on the merits of the case. However, generally Local Governments are not expected to provide information beyond their official records. For example, a Local Government responding to a request about the suitability of land for subdivision, would not be expected have to undertake testing to determine if a site was contaminated and the level of remedial works required to resolve the contamination.

However if, as in the case of *Finlayson v Armidale*, a Local Government *is* aware that land *is* contaminated, not necessarily the extent of the contamination, then as a reasonable authority, the Local Government should disclose that information.

¹⁶ Civil Liability Act 2002 (WA)

2.3.3 Information is provided formally or informally upon request

Whether information is provided formally or informally, the general principles remain. The manner of the inquiry, whether it be an informal telephone call rather than a more formal written request, does not necessarily lower the duty of care owed to those seeking advice.

Case Studies

Shaddock & Associates Pty Ltd v Parramatta City Council: the courts determined that a duty of care did not arise from a telephone enquiry. The nature of the enquiry was insufficient to create a 'special relationship', as a reasonable person could not have been expected to realise that the appellants were intending to purchase the property, or otherwise rely on the information given, particularly as a more formal means of obtaining the information was available. Nevertheless, the Council were ultimately held liable for the more formal and inaccurate advice subsequently provided to the plaintiff.¹⁷

Bivone v City of Salisbury: at the time of lodging a building application, an oral request made the City, asking if there were any road widening proposals that would affect the land in question. The building plans were approved and at the time, the council was aware, or at least should have been aware of a proposal that would have affected the land. In action against the City for negligent misstatement, the court found that the City's officer in providing a verbal answer, was in breach of a duty of care owed to the plaintiff.¹⁸

¹⁷ Federal Law Review (1982) *Shaddock & Associates Pty Ltd v Parramatta City Council*
www.austlii.edu.au/au/journals/FedLRev/1982/6.pdf

¹⁸ Horrigan, B (1998) *Government Law and Policy Commercial Aspects* The Federation Press
https://books.google.com.au/books/about/Government_Law_and_Policy.html?id=6L5ReJCqGsMC

2.3.4 Predictive information and its maintenance

Hazard information is, by its very nature predictive with no guarantee that events predicted will happen and to the extents forecast. As such, there may be some debate about its accuracy. That said, even if upon the release of information, it is widely considered to be accurate, science, the environment and our knowledge of understanding of these frequently change. Accordingly, a person may argue negligence on the basis that the information is out of date and no longer accurate. In such instances, the question of whether a Local Government acted reasonably persists. This means whether a Local Government acted reasonably given all the various obligations that a Local Government must undertake, including the availability of resources.

In determining whether a public body has breached a duty of care, the provisions of the Civil Liability Act 2002 state that *“the functions required to be exercised by the public body....limited by the financial and other resources that are reasonably available”* will be considered. Further, under the Act the general allocation of resources by a Local Government is not open to challenge.¹⁹

However, the publication of hazard information does not mean that Local Governments need not take any further action. Decisions about whether and if so, the frequency with which hazard information should be updated will be the responsibility of a Local Government. In order to avoid findings of negligence, a Local Government will need to demonstrate that in reaching their decisions about updating or not hazard information, they acted reasonably taking into account all relevant considerations and that their decisions were evidence based, documented and clear. As such different councils, with different development pressures, differing environmental conditions and differing availability of resources will make differing decisions about when it may be appropriate to update hazard information. The key will be demonstrating that a council has acted reasonably and therefore in ‘good faith’.

¹⁹ Civil Liabilities Act 2002 (Western Australia) s5W

2.4 Misleading information

In providing hazard information, Local Governments will need to be mindful that as well as being accurate, information should not be misleading. To help overcome some of the challenges of ensuring that information is portrayed correctly and not misleading, Local Governments may wish to consider developing an information request policy together with a set of procedures concerning the provision of information.

Case Study

Port Stephens Shire Council v Booth and Gibson: the council issued certificates which correctly, indicated that the land in question fall within Airport Noise Exposure Forecast (ANEF) 20. However whilst this was true, the land in question was subject to the higher noise rating of ANEF25. The court found that these certificates to be misleading and “*did not adequately warn prospective purchasers of the noise affectation. Their inadequacy was the product of the Council’s then practices.*”²⁰

2.5 Liability for disclosing reasonably accurate risk information

There are no reported cases of either local or other government agencies being found liable for negligence or otherwise for the release of reasonably accurate hazard information.

By the same token and although not necessarily a legal issue, but relevant to the context of this paper, it is worth noting that the Productivity Commission in looking at the barriers to climate change adaption highlighted the effectiveness of the market in persuading adaption. The Commission found that where market prices do not fully reflect risks faced, “*the responses of consumers and households will not deliver the greatest possible level of community wellbeing.*”²¹

There are a range of ways to disclose hazard information. For example, by way of notifications on title, notices on Local Government websites, specified communication and correspondence to community members and so on. The purpose of this Paper is not to be prescriptive about what method should be utilised to disseminate information. Instead Local Governments are encouraged to consider all options available for disclosing information and decide on the most effective and appropriate way to disclose the information. As discussed in section 2.1, these considers will also include the ‘expense, difficulty and inconvenience’ of highlighting the risk posed by a hazard.

²⁰ Port Stephens Shire Council v Booth & Ors; Port Stephens Shire Council v Gibson & Anor [2005] NSWCA 323 (27 September 2005)

²¹ Productivity Commission (2013) Barriers to Effective Climate Change Adaptation

2.6 Disclaimers

In examining the effectiveness of disclaimers in relation to the publication of hazard information, there are two key issues to consider. Firstly, it may be that a Local Government is the only agency holding information about a particular hazard and that the information cannot be sourced from elsewhere. For example, a Local Government may be the only source that can provide information about a former land use upon a lot that may potentially have led to that land being contaminated. Secondly, those seeking information from Local Governments are likely to have high expectation that the information is accurate, properly sourced and maintained. These factors combine to place a particular emphasis on a disclaimer that is quite different to the disclaimers used in sales materials which often encourage the potential purchaser to conduct their own research into the subject matter. Having established these issues, it is important to consider what is being disclaimed, is it the accuracy of the information or the reliability of the information retrieval process, or both? ²²

2.7 Notifications on Title

A number of Local Governments in Western Australia use the provisions of section 70A of the *Transfer of Land Act* to place a notice on a certificate of title alerting property owners to any matter, including hazards that may affect the use of the land. In order for the certificate of title to be endorsed by the Registrar, written consent of the land owner is needed. Accordingly, using the provisions of section 70A, decision making bodies may place conditions on planning approvals requiring a notification to be placed on the certificate of title. Further, under the provisions of the Act, a developer/landowner can be required to pay all costs associated with the preparation and registration of a notification on a certificate of title.

The provisions of section 165 of the *Planning and Development Act (2005)* allow the WA Planning Commission in determining a subdivision proposal to place a notification on title so that land owners are “*aware of hazards or other factors seriously affecting the use or enjoyment of that land*” if the Commission considers it desirable to do so. The Act does not include a similar provision relating development applications, therefore Local Governments will need to give regard to the guidance contained within State Planning Policies.

With this regard, section 6.10 of SPP3.7 states that “*a ‘notice on title’ advising that the site is located in a bushfire prone area should be required as a condition of any subdivision or*

²² Christensen, S Duncan, B & Stickley, A (2008) *Shifting Paradigms of Government Liability for Inaccurate Information*

development approval.”²³ Greater guidance is provided by SPP2.6 which states that ‘where a coastal hazard risk is identified it should be disclosed to those likely to be affected. On consideration of approval for subdivision and/or development current and/or future lot owners should be made aware of the coastal hazard risk by providing the following notification on the certificate on title:

VULNERABLE COASTAL AREA – This lot is located in a [sic] area likely to be subject to coastal erosion and/or inundation over the next 100 years.”²⁴

For other hazards where SPP’s are silent, greater discretion is given to Local Governments to consider whether or not they believe it is appropriate to place a notification on title to alert land owners of potential hazards. With this in mind Local Governments are reminded that in using planning conditions to place a notification on a title, a planning condition must:

- Be valid – that is to say a condition must have a valid planning purpose: it cannot be a matter that is more appropriately covered by other legislation;
- Fairly and reasonably relate to the proposed development and the application of a condition cannot significantly change a development;
- Not be so unreasonable that no reasonable planning authority could have imposed it; and
- Be certain and final.

Furthermore if, as part of a development approval, a condition is placed by the approval body, requiring a developer to do something, there may be a duty to take reasonable care to ensure that the condition has been appropriately met.

²³ WA Planning Commission (2015) State Planning Policy 3.7 Planning in Bushfire Prone Areas

²⁴ WA Planning Commission (2013) State Planning Policy 2.6 State Coastal Planning Policy Guidelines

3.0 Conclusion

It is clear that in undertaking their duties, Local Governments are likely to gain information relating to hazards. When obtaining such hazard risk information Local Governments are encouraged to consider all relevant statutes, regulations, policies and supporting guidelines available and document appropriately their decisions. Considerations in relation to the collation of hazard information should be logical and balanced against any other legitimate concerns and challenges that a Local Government may have. This may include resource constraints, which will be taken in account by the courts in settling any liability claims.

Disseminating hazard information effectively is a critical component of hazard mitigation that helps to ensure that communities are aware of the risks they face. Further, there is no legal impediment to releasing reasonably accurate hazard information. Yet, to the contrary, the failure to not use, or disclose hazard information once it has been gathered could attract various forms of liability. For these reasons, Local Governments are encouraged to disclose their hazard information.

Further, to avoid successful claims of liability, Local Governments will need to take reasonable care to ensure that any information disclosed is reasonably accurate and provided in a manner that considers how the information will be used and by whom. On this basis, Local Governments are encouraged to development a policy and procedure detailing how information will be disseminated and how information requests will be dealt with and ensure that the policy is applied effectively.