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*Risk Managing in the Courts: Seeds of a Divergent Jurisprudence*

# Risk managing in the courts: Seeds of a divergent jurisprudence

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## Introduction

In Australia, risk analysis, risk assessment and risk management are buzz words for decision-makers who must deal with the prospective - but relatively uncertain - impacts of climate change and other environmental risks. But what do these terms mean in practice and how do they play out in the courts? This short paper identifies some divergent approaches to these issues with particular regard to cases involving a risk of flooding.

## Risk and precaution in the Telstra case

In 2006 a land mark case in the New South Wales Land and Environment Court (LEC) explored the approach of the courts to risk assessment in development appeals. In *Telstra Corporation Ltd v Hornsby Shire Council* [2006] NSWLEC 133, Council had refused an application by Telstra to build a mobile telephone base station on the grounds of the Cheltenham Recreation Club. In so doing, Council was responding to vocal community concerns about the safety and amenity of the proposed development. In deciding the appeal should be allowed, Chief Justice Preston considered in depth the role and application of the precautionary principle and its association with risk based assessment. He acknowledged the precautionary principle is pertinent to decision-making under the NSW *Environment Planning and Assessment Act 1979* and accepted the precautionary principle “permits the taking of preventative measures without having to wait until the reality and seriousness of the threats become fully known.”<sup>1</sup> He also argued the precautionary principle cannot and should not be used to try to avoid all risks: “A zero risk precautionary standard is inappropriate.”<sup>2</sup> On the contrary, “In applying the precautionary principle measures should be adopted that are proportionate to the aims pursued.”<sup>3</sup>

To identify a proportionate degree of precaution in relation to risk, Preston CJ favoured applying the ‘usual formulation’ – assessing risk by examining the probability of the event occurring and the seriousness of the consequences should it occur - with some margin for error built into the equation.<sup>4</sup> He suggested a step wise approach - or adaptive management - could be a good way of retaining a margin for error.<sup>5</sup> The final step in the decision-making process would be to compare the risks against the potential costs and benefits of the proposed development:

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<sup>1</sup> *Telstra Corporation Ltd v Hornsby Shire Council* [2006] NSWLEC 133, [126] and [125].

<sup>2</sup> *Telstra* [156]-[158].

<sup>3</sup> *Telstra* [167].

<sup>4</sup> *Telstra* [161]-[162].

<sup>5</sup> *Telstra* [163].

The selection of the appropriate precautionary measures must involve examining both sides of the ledger: the costs associated with the project, process or product (which tends to increase the degree of precaution) as well as the benefits of the project, process or product (which tends to decrease the degree of precaution commensurate with realising the benefit).<sup>6</sup>

He added:

Where there is a choice between several appropriate measures, recourse should be had to the least onerous measure and the disadvantages caused should not be disproportionate to the aims pursued.<sup>7</sup>

### **Risk managing floodplain development**

In Australia our floodplains have been described as the “commercial, social and ecological arteries of the nation,”<sup>8</sup> and “a valuable and sustainable resource capable of multiple but compatible, land uses”.<sup>9</sup> Since 2000, government policy documents have favoured the adoption of risk based, strategic floodplain management plans to guide and steer development in individual floodplains.<sup>10</sup> A floodplain management plan is “a coordinated mix of measures that addresses the existing, future and residual flood problems”.<sup>11</sup> Government policy documents envisage individual floodplain management plans<sup>12</sup> will be based on comprehensive, risk informed assessments of diverse information pertaining to - flood behaviour; the cost of particular measures; environmental and social factors (including the needs of the local community and intangible flood costs); and local, regional and state planning needs, restrictions and opportunities.<sup>13</sup> To assist decision-makers in the all-important task of weighing up divergent sources and types of information, the official guidance recommends combining economic appraisal – which provides a common framework for assessing the effects of alternative management options – and active public consultation to elicit “the community’s wants and desires regarding the development and use of flood prone land”.<sup>14</sup> Once finalised, floodplain management plans should be incorporated into local councils’ statutory land use planning instruments because “[L]and

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<sup>6</sup> Telstra [177].

<sup>7</sup> Telstra [166].

<sup>8</sup> Agriculture and Resource Management Council of Australia and New Zealand, *Floodplain management in Australia: best practice principles and guidelines* (SCARM Report no 73), (CSIRO Publishing, 2000), 1.

<sup>9</sup> SCARM Report, 4.

<sup>10</sup> SCARM Report. See also, Commonwealth of Australia, *Managing the floodplain: a guide to best practice in flood risk management in Australia*, (AEM Handbook no.7), (Commonwealth of Australia, 2013); Commonwealth of Australia, *National Strategy for Disaster Resilience*, (Commonwealth of Australia, 2011).

<sup>11</sup> SCARM Report, 16.

<sup>12</sup> SCARM Report, 16.

<sup>13</sup> SCARM Report 16.

<sup>14</sup> SCARM Report 16.

use planning controls are the most cost effective means of reducing the growth in future flood damage”.<sup>15</sup>

In other advice, floodplain policies across Australia accept it will generally be “economically and practically infeasible to provide complete flood protection up to the PMF (probable maximum flood) event”.<sup>16</sup> That being the case, the primary objective should be “to reduce the effect of flooding and flood liability on individual owners and occupiers of flood-prone property, and to reduce private and public losses resulting from floods” to “acceptable levels”<sup>17</sup> or “As Low as Reasonably Practical” (ALARP principles) with due regard to the affordability of the risk management measures being imposed.<sup>18</sup>

Government policy documents on dealing with flooding risk sit comfortably with the analysis of Preston CJ in the *Telstra* case. Both authorities place heavy reliance on cost-benefit analysis to bridge the divide between diverse, multi-disciplinary sources of information. Both recognise that eliminating risk altogether will seldom, if ever, be the optimal solution; rather, prudent solutions will be proportionate to the level of risk involved and mindful of the economic cost they incur on developers. How helpful then, has this judicial guidance and official policy been in determining development disputes involving flood prone land?

### ***Stockland Development Pty Ltd v Sunshine Coast Regional Council and Others* [2014] QPELR 52**

In *Stockland v SCRC*, Stockland had applied for a preliminary approval to develop a master planned community comprising 950 residential allotments capable of housing approximately 2,000 people. The site of the application was farmland, included in the East Maroochy Cane Lands precinct of the Maroochy River Plains Planning Area. The existing precinct intent was to allow sugar cane and other agricultural pursuits and a draft new planning scheme indicated a similar intent for the land. The land was mapped as an area prone to flooding in both the Maroochy Plan and the draft planning scheme. The Sunshine Coast Regional Council (SCRC) had refused the application but Stockland appealed that decision arguing that, despite conflicts with the planning scheme, there were sufficient grounds to justify approving the application - primarily a need for new housing. Although

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<sup>15</sup> SCARM Report, 70. Other management measures are structural controls, development and building controls and flood emergency measures p 7) The flood management options identified in the SCARM report are - avoid the risk (eg through land-use planning); reduce the likelihood of floods occurring (eg by structural measures to provide protection); reduce the consequences of flooding (eg through building regulations); transfer the risk of flooding (eg through insurance) (this was not a current option in Australia); finance the risk (eg through the Commonwealth’s Natural Disaster Relief Arrangements); accept the risk (eg by preparing for residual risk in flood emergency measures SCARM Report, 7- 9.

<sup>16</sup> SCARM Report, 1. See also, New South Wales Government, *New South Wales Flood Policy* (New South Wales Government, 2006) s 1.1.

<sup>17</sup> SCARM Report, xiv and 4.

<sup>18</sup> SCARM Report, 52.

not the only issue, the flood prone status of the land was discussed in some detail and clearly had a bearing on the judge's final decision.<sup>19</sup>

To get around the conflicts with the planning scheme, the appellant highlighted the land's location within the "Urban Footprint" of the South East Queensland Regional Plan and its former designation as an urban growth area in council's draft growth management strategy. The appellant also made reference to the subsequent 2008 Sunshine Coast Growth Management Position Paper which identified flooding constraints as the primary reason why the land was no longer considered suitable for urban development. The appellant's argument was that, if flooding was the main constraint preventing urban development, then, provided the flooding constraint was adequately mitigated, urban development should be allowed.

The measures put forward by the appellant to mitigate the flooding risk were:

- Filling the site so that it would be immune from flood to at least the ARI 100-year event, including allowing for potential sea level rise from future climate change.
- Reconstructing the David Low Way, immediately east of the Motorway to achieve a flood immunity to the 50-year ARI level, and remain trafficable, albeit inundated to some extent, to the 100-year.<sup>20</sup> This would achieve compliance with the requirements of the current Planning Scheme and result in a development with significantly greater flood immunity than the neighbouring Twin Waters Residential Estate.<sup>21</sup>
- An evacuation and a "shelter in place" strategy. This included filling part of the site to achieve probable maximum flood (PMF) immunity, thereby providing an area to which isolated residents could resort to seek refuge, on site, until the flood waters recede.<sup>22</sup>

In response, Council conceded the appellants could use engineering solutions to mitigate the flooding hazard. It maintained, however, that, in this particular case, the risks should be avoided - by not permitting the development to go ahead – rather than mitigated - by filling the site and adopting an emergency management plan. Council claimed its position had support in the draft planning scheme which adopted an "avoid if practicable but mitigate if not" approach to development.<sup>23</sup>

Ultimately, his Honour Judge Rackemann agreed with this "conservative" approach to managing the flood risk:

The development would result in the raising of the David Low Way and the creation of a flood refuge in an area prone to flooding but, on the other hand, would locate an additional residential population, of approximately 2000 people, into the floodplain, thereby potentially putting more people at risk and potentially adding to the burden on local and state emergency responses in times of disaster.<sup>24</sup>

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<sup>19</sup> *Stockland Development Pty Ltd v Sunshine Coast Regional Council and Others* [2014] QPELR 52 [83].

<sup>20</sup> *Stockland* [88].

<sup>21</sup> *Stockland* [90].

<sup>22</sup> *Stockland* [96].

<sup>23</sup> *Stockland* [192] citing s 3.10.2.1c of the draft planning scheme.

<sup>24</sup> *Stockland* [192].

That level of risk was unacceptable in the context of the applicable planning instruments. Overall, the appellant had failed to demonstrate a strong or overwhelming need for housing otherwise than in accordance with the planning scheme.<sup>25</sup>

The discussion in this case raised the question whether development should be avoided altogether or mitigated by way of development controls and design features. In Queensland, the State Planning Policy contemplates both strategies – councils can choose to avoid the risk of flooding or to allow development provided the risk is mitigated to a tolerable or acceptable level.<sup>26</sup> In its most recent planning documents, Council had opted for a strategy of avoidance. Even though all parties agreed the risk could in fact be mitigated to an acceptable level, the judge affirmed Council’s preference for avoiding development altogether: “That ‘avoid if practicable but mitigate if not’ approach is conservative, but understandable and worthy of some respect.”<sup>27</sup> Simply put, a normative, precautionary approach prevailed: Council’s conservative planning instruments trumped more flexible notions of acceptable and affordable risk management.

### ***Lakeside Numurkah Developments Pty Ltd v Moira Shire Council* [2013] VCAT 1355**

Queensland is not the only jurisdiction where precaution has trumped risk management.

In *Lakeside Numurkah Developments Pty Ltd v Moira Shire Council*, Moira Shire Council had refused (by not deciding) an application to sub-divide twelve vacant lots into 64 residential lots on land located 1.4 km north-east of Numurkah town centre. Numurkah is a town located on the banks of the Broken Creek and the development site also lay close to the river. Both are subject to flooding but, nevertheless, the land in dispute was zoned Residential Class 1 and various planning documents identified Numurkah (particularly north and east of the town centre) as a township ripe for “accommodating urban consolidation”.<sup>28</sup> Two flood overlays applied across part of the site but in 2012 local flooding had exceeded the current predictions for a 1 in 100 year event in both those instruments.

The Applicant acknowledged the risk of flooding but argued it could be appropriately managed in the design of the subdivision. Among the design measures proposed the Applicant planned to raise the lots to ensure floor levels 0.3 metres higher than that recommended and to design the main access road to serve as a floodway for flood water when required.<sup>29</sup> The Goulburn Broken Catchment Management Authority (GBCMA), a referral authority for the application, had not objected to the application given these and other design details.<sup>30</sup> In the Victorian Civil and Administrative Tribunal (VCAT), however,

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<sup>25</sup> *Stockland* [209].

<sup>26</sup> Queensland Government, *State Planning Policy 2016*, 51.

<sup>27</sup> *Stockland* [100].

<sup>28</sup> *Lakeside Numurkah Developments Pty Ltd v Moira Shire Council* [2013] VCAT 1355, [43]-[44].

<sup>29</sup> *Ibid* [57].

<sup>30</sup> *Ibid* [20].

Member Potts reaffirmed the decision of Council and refused the application. Whilst accepting there was policy support for subdivision of the land, Member Potts believed the flooding risk and associated hazards could and should not be overlooked. Particular design issues that concerned Member Potts included the developer's reliance on the wider flood plain to absorb the small decrease in on-site flood storage and the proposal's failure to provide on-site water treatment.<sup>31</sup> In the view of Member Potts, solutions to these issues needed to be found on site to ensure "no net loss". To allow otherwise would conflict with "a general planning policy principle" to avoid "the longer term impact of incremental effects that accumulate with each such planning decision".<sup>32</sup> Overall Member Potts concluded the proposal "seeks more than can be accommodated by the constraints of its floodplain storage function, i.e. it is an overdevelopment of the land."<sup>33</sup> The appeal was refused.

### **Conclusion – when precaution trumps risk managing.**

To some extent, the decisions in both *Stockland* and *Lakeside* fly in the face of the official wisdom, that flooding risk in new developments can and should be risk managed to acceptable levels. Both decisions expose the weaknesses in that policy – reliable information is often unavailable, incomplete or contrary to lived reality; the community's risk appetite for flooding is largely unknown – especially when the eventual landowners are not currently identifiable; flooding risk is only one of many planning considerations at stake; development conditions may not prove sufficient or be properly implemented over time and councils fear financial and political liability down the track for poor decision-making. In these circumstances, perhaps it is no wonder both councils opted for more conservative, precautionary decision-making and their preference was upheld by the courts.

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<sup>31</sup> Ibid [73].

<sup>32</sup> Ibid [52].

<sup>33</sup> Ibid [55].