



ASIC

Australian Securities & Investments Commission

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Attention: David Hatfield
Acting General Manager
Adjudication Branch
Australian Competition and Consumer Commission
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By facsimile to (02) 6243 ~~1199~~ 1047.

Dear Sir

Re: Application for Authorisation A91086 by Insurance Council of Australia

ASIC is responding to the application for authorisation by the Insurance Council of Australia (ICA) for its members to adopt, on a voluntary basis, a common definition of 'inland flood' in their insurance policies.

ASIC understands that, in determining the application, the ACCC is required to determine whether the benefit to the public from the proposed authorisation would outweigh the resultant detriment constituted by any lessening of competition in the market. ASIC is responding to the ICA application with comments designed to enliven the ACCC's consideration of this question.

ASIC has previously publicly stated that it is desirable that key definitions be harmonised through the use of common terms. This is still ASIC's position. However, this response to the ICA application comments on the merits of the particular proposal.

Proposed Definition Compared to Existing Definitions

The proposed voluntary definition has three limbs, in that inland flood is the covering of land that is not normally under water by:

- (a) Water that overflows or escapes from a naturally occurring or man made inland watercourse (such as a river, creek, canal or storm water channel) or a water pool (such as a lake, pond or dam), whether it is in its original state or it has been modified, or
- (b) Water released from a dam whether it be accidentally released or intentionally released to control, mitigate, regulate, or otherwise respond to excess water, or
- (c) Water that cannot drain or run off as a result of water that is overflowing or escaping from an inland watercourse or water pool preventing the escape of water.

Paragraph 3.1 of Attachment A to the ICA application states in part: *"For insurance purposes, flood damage generally refers to the inundation of a property by water which overflows from a natural watercourse, while storm and tempest damage refers to the inundation of a property by water as the result of a storm."*

The proposed voluntary definition therefore appears to differ from current definitions in the following ways:

1. Part (a) of the definition covers damage from both natural and man made watercourses, not just natural watercourses.
2. Part (c) of the definition covers damage from a cause not regularly appearing in current policies, including where stormwater cannot drain away from a house, because the course it would normally take is itself overflowing, and instead causes water damage to the house. Under current definitions this damage would only be excluded where the water entering the house was a combination of both covered and excluded water sources.
3. There is no distinction between flash floods (ie where the flooding is the result of a storm and occurs within 24 hours of the storm having commenced) and other types of flood. Some current policies cover flash floods but not other floods.

The effect on consumers of an insurer adopting the common definition will depend on whether that insurer is using the definition to define the cover it offers or to define the terms of an exclusion. Where an insurer uses the common definition to exclude liability, and previously used a narrower definition, then this will result in a reduction of cover for the homeowner. To the extent this is an issue it is more likely to arise in flood prone areas where insurers are more likely to exclude cover.

ASIC is not in a position to estimate or provide any information in relation to the extent of this risk occurring in practice. However, it considers that it would need to be considered in any evaluation of the public benefit and that it may need further information from the ICA.

Other Comments

ASIC has the following additional comments:

- o The application suggests that insurers may elect to adopt the definition in total - that is, either cover or exclude damage caused by paragraphs (a) to (c) above

– or only include damage from some limbs of the definition but not all. It is desirable that the phrase '*Inland Flood*' only be used where the definition is being applied in full and not qualified, or not substantially qualified, by other terms of the policy. It follows that the term should not otherwise be available for use by insurers, as this would defeat the intention of giving this phrase a distinct and readily recognised meaning.

- o The adoption of the definition may result in some insurers offering a broader level of cover, and therefore in the insured being charged a higher premium. If the premium is too high it may discourage insureds from seeking adequate flood cover, and obtaining alternative insurance. It may be appropriate for the ACCC to consider this in determining whether the public benefit is adversely impacted or whether it may be able to be addressed in other ways (for example, a higher excess for flood claims, rather than by an increase in the upfront premium).
- o The doctrine of proximate cause may apply to exclude a claim, where the water is a combination of causes, one covered and one not (for example, in coastal areas where flood may be the result of a combination of sea waters and an overflowing inland watercourse). It would be preferable for the policy to specifically state that cover will be excluded in these circumstances, rather than it arising indirectly through the application of the doctrine at the point of claim. Educational messages which suggest that the consumer is covered by '*Inland flood*' may otherwise need to be qualified.

Yours Faithfully,



Delia Rickard
Acting Executive Director, Consumer Protection and International, Regional
Commissioner, ACT