



1 August 2008

By email: adjudication@accc.gov.au

The General Manager
Adjudication Branch
Australian Competition and Consumer Commission
PO Box 1199
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Dear Sir/Madam

**Preliminary outline of written submissions - for pre-decision conference
Insurance Council of Australia application for authorisation A91086**

We welcome the opportunity to attend a pre-decision conference convened by the Australian Competition and Consumer Commission (**ACCC**) in respect of the above application for authorisation lodged by the Insurance Council of Australia (**ICA**).

As we stated in our previous correspondence regarding this matter, our organisations are concerned that the ICA's proposal for a common definition of 'inland flood' is not only anti-competitive, but is also unlikely to provide much public benefit and, in fact, will potentially cause significant public detriment.

Below we outline the nature of our concerns with the ICA application for the purposes of consideration prior to the pre-decision conference. A final written submission will be provided to the ACCC in due course.

As an initial matter we note that insurance coverage for flood damage is an issue that has raised, and continues to raise, significant public concern.

We would welcome effective initiatives to address the problems associated with flood damage insurance cover, but we do not consider that the ICA's proposal in this matter is such an initiative. However, we would support an opportunity to work with the ICA on developing a new proposal for a common definition for 'flood' that provided greater legal certainty and fairer outcomes for consumers, for adoption across the whole industry, to be resubmitted to the ACCC for consideration for authorisation at a future date.

We also note that, given no consultation with consumer representatives has occurred on the current proposal (which in our view is flawed in any case as set out below), it will be particularly difficult for the ACCC to assess sufficiently its potential public benefit.

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1. Anti-competitive detriment – voluntary proposal

The ACCC has already accepted that the proposal has the potential to create significant anti-competitive detriment as, by its nature, it permits insurers to collude as to the nature of the insurance cover they will offer consumers. Importantly, the proposal allows for voluntary adoption of the common definition of 'inland flood' rather than mandatory adoption across the industry, which increases the potential for anti-competitive detriment because it would allow insurers to pick and choose the situations in which it would benefit them to collude or not as to adopting the common definition.

2. Lack of public benefit - increasing, not reducing, consumer confusion surrounding insurance coverage for flood damage

There has been significant consumer confusion in the community about whether their own, or other, insurance policies cover flood damage and to what extent. An initiative to provide for a common definition for flood damage in household insurance policies therefore has some potential for consumer benefit if executed appropriately.

However, as noted above, this proposal is not for mandatory adoption of a common definition of 'inland flood' by insurers. Rather, if authorised the proposal would allow insurers to adopt the common definition if and when they wish. Any potential benefits in terms of reducing consumer confusion that might arise from the adoption by insurers of a common definition for flood damage are fatally undermined by the proposal's voluntary nature. As a voluntary measure it cannot, by its very nature, ensure any greater consistency in the coverage provided by different insurance policies.

Further, it has the significant potential to increase consumer confusion as to insurance coverage for flood damage. By adopting and promoting a common definition of 'inland flood', members of the community might well come to assume that this definition automatically applies to their own policy and/or when shopping around to all policies, whether this is the case or not. The ACCC's proposed conditions regarding the authorisation might have the perverse effect of increasing this confusion even further because the more effective the communications campaign, the more likely it is that consumers will be aware of the common definition and assume it applies whether it does or not.

Moreover, there is a risk that consumers will be confused due to the fact that this definition has been "ACCC approved". This may lead to consumers to assume that the definition applies and/or is reasonable and appropriate, due to the fact that the ACCC has "authorised" it.

3. Lack of public benefit - less coverage for consumers and lack of legal clarity and certainty

The common definition of 'inland flood' will be used primarily, as it appears now in most consumer general insurance policies, in relation to **exclusions** of cover for flood damage, not the inclusion of such coverage, in insurers' policies.

This is the case due to the operation of the *Insurance Contracts Act 1984* (the **Act**) and the *Insurance Contracts Regulations 1985* (the **Regulations**). The Act provides that, for prescribed types of insurance contracts, the insurance contract **must cover** prescribed events, **unless** the insurer clearly informs the insured in writing (whether by providing the insured with a document containing the provisions, or the relevant provisions, of the proposed contract or otherwise) or the insured knows, or a reasonable person in the circumstances could be expected to know, that liability is reduced or excluded (s.35).

The Regulations prescribe home building and home contents insurance contracts for this purpose, and the events that must be covered include 'storm, tempest, flood, the action of the sea, high water, tsunami, erosion or land slide or subsidence' (rr.9-16). Thus flood, storm and sea water damage are covered by household insurance policies unless clearly excluded. Indeed, we are very concerned that this proposal is a "backdoor" attempt to avoid the operation of the statutory standard protection provisions, which have been implemented by the Parliament and Government in the public benefit.

The proposed common definition of 'inland flood' is more expansive than flood exclusions currently seen in insurance policies on the market. This means that, if adopted by insurers, it will likely reduce the coverage for flood damage that consumers would otherwise have. For example, current flood exclusions do not exclude pond overflow, nor are private dam or man-made watercourse overflows ordinarily excluded. Flash floods also appear to be captured by the flood definition, which is not ordinarily the case in current policies.

Further, the proposed common definition will introduce new legal uncertainty into this area. For example, the inclusion of the term 'water pool' is new and it is entirely unclear what this might mean in practice or for a legal decision on coverage. The third limb of the proposed definition is also a new concept and unclear as to meaning or effect. It is also unclear how water damage related to rainwater tanks might be treated. Moreover, the proposed definition appears to remove artificially the doctrine of 'proximate cause' that is ordinarily an important aspect of determining whether or not damage was "caused" by flood for the purpose of insurance coverage. In addition to the general detriment that would be caused by introducing new legal uncertainty to this area, we do not consider that it is appropriate for an application authorisation to essentially become a vehicle for the introduction of new and uncertain legal concepts into the insurance law field.

4. Lack of public benefit – disproportionate impact on low-income and disadvantaged consumers

This proposal, if approved, would be likely to have a disproportionate impact on those consumers least able to afford insurance coverage.

Wealthier consumers are able to by-pass problems regarding exclusions by purchasing more expensive insurance policies that provide full coverage, including for flood damage. However, low-income and disadvantaged consumers, if they are able to afford household insurance, are much more likely to purchase cheaper coverage, which will likely be insurance that includes exclusions, such as for flood damage.

This means that lower-income households are disproportionately represented among the ranks of insureds with exclusions for flood damage in their household insurance policies. As this proposal would be likely to reduce further the coverage for flood damage that consumers with such exclusions would otherwise have, as noted in section 3 above, this reduction in coverage will be felt disproportionately by lower-income households.

Further, disadvantaged consumers, particularly non-English-speaking consumers and consumers with an intellectual or mental disability, are in our experience less likely to be able to make an informed choice in respect of insurance products. The best form of protection for disadvantaged consumers is therefore not an education campaign, but a common definition that contains the ordinary and reasonable meaning of the words 'inland flood'. It is fair to say that, for the reasons set out in section 3 above, the proposed common definition contains neither the ordinary nor reasonable meaning of 'inland flood'.

5. Communications campaign

As a final matter, we note that the ACCC's draft determination proposed to authorise the ICA's application subject to conditions surrounding the ICA's communications campaign.

To the extent that a communications campaign might provide public benefit (but see section 2 above), we remain concerned about the ICA's ability to deliver an effective and helpful campaign. The mere fact that the ICA considered it appropriate to simply place the common definition on its website as a sufficient communications plan demonstrates a lack of capacity in this regard.

If an appropriate proposal for a common definition for flood damage were to reach the ACCC, we would consider that improved requirements for a communications campaign would be warranted, including that an appropriate and proactive communications plan was formulated and included with the application, rather than that the ICA simply report after-the-fact. We do not consider that any proposal can be properly considered without knowing in advance whether the communications campaign has been planned appropriately and effectively.

Please contact us on 03 9670 5088 (Consumer Action) or via our email addresses if you have any questions.

Yours sincerely

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