



**Australian
Competition &
Consumer
Commission**

Pre-Decision Conference

Minutes

Authorisation A91086 lodged by the Insurance Council of Australia

4 August 2008

The information and submissions contained in this minute are not intended to be a verbatim record of the pre-determination conference but a summary of the matters raised. A copy of this document will be placed on the ACCC's public register.

**Pre-Decision Conference: Authorisation A91086 lodged by
the Insurance Council of Australia**

11am, 4August 2008

ACCC Melbourne Office
Level 35, The Tower
360 Elizabeth Street
Melbourne Central, Melbourne

Sydney ACCC office, Canberra ACCC Office and Brisbane ACCC office via Video Link

Attendees:

Australian Competition & Consumer Commission	Stephen King (Chair) Commissioner Richard Chadwick General Manager - Adjudication Susan Philp Director - Adjudication Jasmine Tan Project Officer - Adjudication
Insurance Council of Australia	Carolyn Oddie Partner Allens Arthur Robinson Charlotte Ahearne Lawyer Allens Arthur Robinson
Consumer Action Law Centre	Nicole Rich Director – Policy & Campaigns
Legal Aid Commission of NSW	David Coorey
Insurance Law Service	Katherine Lane
Legal Aid Queensland	Catherine Uhr Solicitor Consumer Advocate Civil Justice (Consumer Protection Unit)
West Heidelberg Community Legal Service	Denis Nelthorpe
Consumers' Federation of Australia	John Berrill
Australian Securities and Investments Commission	Christian Mikula

Conference commenced: 11:05am

Commissioner Stephen King welcomed attendees and made some introductory remarks outlining the purpose of the conference.

Commissioner King declared the pre-decision conference open and invited the party that called the conference, Ms Nicole Rich of the Consumer Law Action Centre, to make an opening statement.

Consumer Law Action Centre, Ms Nicole Rich, Director – Policy & Campaigns

Ms Rich opened the conference by providing a brief outline of the interim submission made by the Consumer Law Action Centre (attachment A). Ms Rich noted:

- the common definition of ‘inland flood’, proposed by the Insurance Council of Australia, lacks clarity and legal certainty. Ms Rich expressed concern that the definition would be used as an exclusion clause, rather than an inclusion clause.
- the definition would not result in reduced consumer confusion (the primary public benefit to be gained from authorising the conduct) for four main reasons.
 1. adoption of the definition was voluntary.
 2. the definition was seriously flawed because it used words that were not legally defined.
 3. authorisation would result in detriment being borne disproportionately by low income and disadvantaged consumers.
 4. the education campaign is unlikely to be effective and so the conditions outlined by the ACCC in its draft determination are flawed.

Ms Rich noted that the Consumer Law Action Centre would provide a more detailed submission to the ACCC commenting upon the draft determination by the 8th of August 2008.

Legal Aid Commission of New South Wales, Mr David Coorey

Mr Coorey provided a brief outline of the Legal Aid Commission’s consumer advocacy role and its experience in assisting consumers in responding to matters of insurance law. Mr Coorey endorsed the submissions of the Consumer Law Action Centre and provided the following observations in respect of the Insurance Council’s proposal:

- Mr Coorey noted that the proposed common definition had not, to the best of his knowledge, been applied in any insurance policy in Australia. Mr Coorey noted that he had examined a number of different extensions to the definition of flood and he believed the introduction of an additional definition as proposed by the Insurance Council would compound consumer confusion.

Mr Coorey submitted that the term ‘water pool’ in the proposed common definition required clarification, noting that it was unclear whether structures such as private dams would fall within its scope. Mr Coorey also noted the lack of clarity as to man-made water courses and water flowing into property.

Mr Coorey submitted that the proposal would not result in benefits to consumers and that the common definition, in its current form, would cause significant harm to consumers, particularly disadvantaged consumers.

Mr Coorey noted that he does not have a conceptual problem with the idea of a common definition, he only had a problem with the breadth of the current proposal. Mr Coorey said he would encourage the Insurance Council to withdraw its application and develop a revised definition in consultation with consumer advocates before resubmitting the proposal to the ACCC.

Insurance Law Service, Ms Katherine Lane

Ms Lane provided a brief outline of the Insurance Law Service and its experience in assisting consumers in responding to matters of insurance law. Ms Lane endorsed the submissions of the Consumer Law Action Centre and the Legal Aid Commission of New South Wales and provided the following observations in respect of the Insurance Council's proposal:

- Ms Lane noted that should authorisation be granted public detriment would result. Ms Lane considers that the proposed definition is broader in scope than current definitions applied by the insurance industry and noted that when applied as an exclusion this would result in an increase in the denial of claims by consumers.
- people who live in flood-prone areas are typically low-income consumers who, if they chose to purchase insurance, would be likely to purchase a cheaper option that offered less coverage and, with a wider definition for 'flood' being excluded from their policy, they would suffer a disproportionately great impact from the introduction of the proposed definition.
- no effective communications strategy could be undertaken without strict requirements and oversight by the Australian Securities and Investments Commission. Ms Lane further noted the difficulties and significant uncertainties in providing an effective communications campaign where the definition could be adopted as either an exclusion or an inclusion.

Ms Lane submitted that should approval be granted, the insurance industry should report on how the definition was being used and, if it was being used to exclude flooding from policies under the broader definition, detriments should be documented and authorisation revoked. Ms Lane also raised concerns about the impact the new definition on premiums.

Legal Aid Queensland, Ms Catherine Uhr

Ms Uhr provided a brief outline of the role of Legal Aid Queensland and its experience in assisting consumers in responding to matters of insurance law.

Ms Uhr endorsed the submissions of the Consumer Law Action Centre, the Legal Aid Commission of New South Wales and the Insurance Law Service.

- Ms Uhr noted that while there are currently variations in terminology applied to flood, this is less of a problem in terms of providing advice because the interpretation of the terms were well-established enabling Legal Aid to develop accessible publications responding to the current definitions. Ms Uhr expressed concern as to the likely impact of the common definition, noting the uncertainty of its terms.

- Ms Uhr expressed concern that approval by the ACCC may be interpreted by consumers as an endorsement of the new definition, despite the fact that there was no defined law governing the definition and it had not undergone government review. Ms Uhr also expressed concern about the effectiveness of the Insurance Council's proposed communications strategy.

Ms Uhr noted that a number of interested parties, including representatives of seniors, multicultural and disability groups, had not been consulted or invited to make a submission responding to the Insurance Council's proposal. Ms Uhr submitted that these parties would have a keen interest in the proposal and request that consideration be given to extending the consultation process to allow for greater participation.

Australian Securities and Investments Commission, Mr Christian Mikula

Mr Mikula provided a brief outline of ASIC's role and interest in this proposal and provided the following observations:

- Mr Mikula noted that at paragraph 6.28 of the draft determination Insurance Council's submission outlined that the new definition would reduce consumer confusion by using a consistent definition. Mr Mikula submitted that ASIC considered that the public benefit must however be tested against whether there is broader coverage resulting from the new definition.
- Mr Mikula noted that overseeing a communications campaign was part of ASIC's role and that he would be happy to do this monitoring, either formally or informally, as ASIC has experience in running cost-effective education campaigns.

Mr Mikula agreed that the common definition may affect disadvantaged consumers more than others.

- Mr Mikula expressed support for the requirement that the Insurance Council publicly report on which insurers were using the definition as an inclusion and which were using it as an exclusion. Mr Mikula submitted that the ACCC should require that, if the definition were used as an exclusion, then those insurance holders who would no longer be covered should be advised upon renewal of their policy and that this be part of the communications campaign.

Consumers Federation of Australia, Mr John Berrill

Mr Berrill provided a brief outline of his experience in assisting consumers in responding to matters of insurance law. Mr Berrill also endorsed the submissions of the Consumer Law Action Centre, the Legal Aid Commission of New South Wales and the Insurance Law Service before providing the following observations:

- Mr Berrill noted his in principle support for the adoption of a common definition in circumstances where that definition was clear and where that definition was reflective of a consumers common understanding of what 'flood' entailed.

Mr Berrill noted that he agreed with the submission of Mr Coorey that the proposed definition was not one that has been applied in Australia. In particular Mr Berrill noted that the term 'water pool' is not clearly defined or sub-defined in the application and lacks legal definition. Mr Berrill noted that the term 'dam' is similarly undefined and was likely to be the subject of confusion amongst consumers, drawing upon litigation examples to demonstrate.

- Mr Berrill also drew attention to the use of examples in the Insurance Council's proposed definition of 'flood' and commented that this made the definition ambiguous, as the examples were not exhaustive. He submitted that this led to uncertainty as to what was and was not covered.

More generally Mr Berrill noted that there were various definitions applied to flood events and that they were not consistent. Mr Berrill submitted that the term was usually defined as "the overflow of water from a naturally occurring watercourse or dam".

Mr Berrill expressed concern that the definition was seeking to avoid the doctrine of proximate cause and that this would lead to great confusion amongst consumers. Mr Berrill was also concerned that the adoption of the proposed common definition as an exclusion would lead to a reduction in cover provided to consumers resulting in public detriment.

West Heidelberg Community Legal Service, Mr Denis Nelthorpe

Mr Nelthorpe provided a brief outline of his experience in assisting consumers in responding to matters of insurance law. Mr Nelthorpe also endorsed the submissions of the Consumer Law Action Centre, the Legal Aid Commission of New South Wales and the Insurance Law Service before providing the following observations

Mr Nelthorpe expressed concern that the Insurance Council was seeking to use the authorisation process to diminish the statutory provisions of the Insurance Contracts Act, noting that the proposed common definition would reduce the level of 'standard cover' provided to consumers under section 35 of the Insurance Contracts Act.

Mr Nelthorpe submitted that young, lower income consumers and those who built on flood plains would be most affected by the new flood definition because they did not have a good understanding of insurance.

- Mr Nelthorpe noted that insurers such as GIO and APIA now offer riverine flood cover and exclude coastal flood cover. He submitted that this indicated that the industry was changing quickly, but most consumers could understand these definitions. Mr Nelthorpe expressed concern that the common definition created a whole new area of potential litigation.
- In respect of the proposed consumer awareness campaign,
 - Mr Nelthorpe provided a comparison of consumer materials provided by the Insurance Council to those provided by peer organisations such as the Australian Bankers Association. Mr Nelthorpe observed that the Insurance Council's website had no consumer fact sheets and the little information that it did provide was difficult to locate. Mr Nelthorpe further noted that the Insurance Council did not provide enough information targeted at aged consumers.
 - In terms of the insurance industry's experience in conducting effective consumer education campaigns Mr Nelthorpe noted the experience of consumers affected by the Canberra bushfires. In this case it was found that most consumers were underinsured and those who had insurance had obtained their quotes from the insurers' websites.
 - Mr Nelthorpe noted the recommendations of the review of the General Insurance Code of Practice, including the recommendation that the Insurance Council adopt an education campaign directed at consumers

and the general public. Mr Nelthorpe expressed concern that the Insurance Council had not acted upon this recommendation.

Mr Nelthorpe concluded that the Insurance Council's record and credentials in respect of consumer education campaigns were poor.

ACCC clarifications

Timeframe for consultation

Dr Chadwick provided a brief explanation of the requirement under the Trade Practices Act that the ACCC reach its determination within a set timeframe (6 months). Dr Chadwick noted that this timeframe could be extended with the agreement of the insurance Council and that this would be discussed with the applicant in the coming days.

Commissioner King invited further comments and engaged in a general discussion of points raised by attendees. Any additional comments made by attendees have been reflected in the summation of submissions provided above.

Commissioner King closed the conference, noting that the ACCC would be providing a written record of the conference to attendees.

Conference closed: 12.50pm



1 August 2008

By email: adjudication@accg.gov.au

The General Manager
Adjudication Branch
Australian Competition and Consumer Commission
PO Box 1199
DICKSON ACT 2602

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

CONSUMER ACTION LAW CENTRE



Nicole Rich
Director – Policy & Campaigns

Also on behalf of:

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