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Insurance Council of Australia application for authorisation AA1000720 – Interested party consultation

Thank you for the opportunity to comment on the Insurance Council of Australia's (**ICA's**) application for authorisation AA1000720 (**the Application**). This submission has been drafted on behalf of Financial Rights Legal Centre (**Financial Rights**), Consumer Action Law Centre (**Consumer Action**), Financial Counselling Australia (**FCA**) and WestJustice. The submission is made up of:

- an executive summary
- further background to the ICA's Application
- a discussion on the Proposed Conduct
- our views on the benefits that may arise from the Proposed Conduct
- our views on the detriments that are likely to arise from the Proposed Conduct, and
- proposed conditions to the ICA's Application

Kind Regards,

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Executive Summary

The Application and the Proposed Conduct therein is unlikely to result in a public benefit that outweighs the detriment to the public. Consequently, we oppose the ACCC authorising the Application.

Consumer representatives do not oppose the application easily. The consumer movement has long called for measures to address the harms consumers are experiencing with respect to the application of a bundle of key terms of exclusion in home insurance policies. We have consistently sought harmonisation and simplification of specific terms relating to "maintenance," wear and tear," "pre-existing damage" and "defects" in the form of standardised definitions. Combined with educational materials and further reforms to insurer claims handling, we believe the consumer harms we regularly see everyday can and should be addressed.

Despite holding the position that key terms and exclusions should be standardised by Government advised by an expert independent panel balancing competing stakeholder interests,[1] we have approached the ICA's work on this Application in good faith and in a willing and constructive manner to achieve unified position. However, the resulting Proposed Conduct in the Application is in our viewed fundamentally flawed, fails to address the problems that it purports to solve, will bring limited benefit to policyholders and will likely exacerbate a number of the issues policyholders currently face.

The Proposed Conduct is flawed in several respects:

- there is no guarantee that any Insurer will adopt the proposed Standard Definitions in their home insurance policies
- the Proposed Standard Definitions:
    - do not standardise either the scope of coverage or the application of these terms of exclusion
    - do not address causality
    - do not address the notion that a consumer should be able to reasonably observe wear and tear, defect or damage
    - do not address key related terms "pre-existing damage" and "defect
    - include proposed examples that have the potential to be used against insureds

[1] See Joint Consumer Submission to Treasury's consultation paper on standardising natural hazard definitions and reviewing standard cover for insurance, 17 April 2024

    - creates the risk that consumers' rights and remedies under Section 54 of the Insurance Contracts Act are not available or allows insurers to litigate this issue
    - use terminology that introduces complexity, and
    - do not limit their application to the coverage period of the contract.

What benefits that do arise from the Proposed Conduct are minimal and limited.

- The Proposed Conduct could improve understanding of what is expected of policyholders - if little else - but is likely to still lead to surprising claims denials. This could however be achieved through an Education Campaign alone.
- The harmonisation of some key terms relating to the maintenance of a property can provide some clarity to contractual terms and the ability to compare products but does so in extremely limited ways.

On the other hand, there are significant detriments that are likely to arise for policyholders.

- The Proposed Conduct will likely increase rather than decrease consumer confusion:
    - Consumers will be given the impression that there will be one definition for these terms when this is unlikely to be the case since the take-up of the definitions is entirely voluntary
    - Consumers will expect that the standard definitions for these terms will lead to more consistent outcomes when the drafting maintains the ability of insurers to apply exclusions based on different contract terms that cover the scope of coverage
    - Consumers may be under the false impression that issues of "pre-existing damage and/or defect" will be made consistent when they are not, and
    - Consumers may misread the list of examples in the Proposed Definitions as the sum total of expectations, when they should not
- The Proposed Conduct also:
    - introduces concepts which lack legal certainty
    - creates the risk consumers cannot rely on the consumer protections afforded by Section 54 of the *Insurance Contracts Act* with respect to "maintenance" and, as such, there is sufficient uncertainty that insurers are prepared to litigate the issue (being in mind litigation is something very few consumer policyholders could afford to be embroiled in, leaving aside the stress and anxiety of such litigation).
    - will embed the implied approach currently taken by insurers where they do not take your home as they find it at the start of an insurance contract, and

- will prevent the introduction of a simpler, more comprehensive set of Standard Definitions for key terms that will more fully address the issues faced by consumers.

Given these concerns, consumer groups have proposed a series of conditions that the ACCC should impose on the ICA to amend the Proposed Standard Definitions. These include

- framing the maintenance definition as a "condition" rather than a "clause"
- addressing causality and observability in the definition
- addressing defects and pre-existing damage in the definition
- referencing to section 54 of the *Insurance Contracts Act*
- confining the application of the terms to the period of insurance a policy
- removing the list of examples from the Proposed Definitions, and
- clarify the role of the "natural environment" and "weather" in the definition of wear and tear.

If the conditions are not accepted then the ACCC should deny authorisation AA1000720.

Background to the Application

Issues faced by consumers regarding "maintenance" and "wear and tear exclusions" in home insurance

Consumer groups have been long concerned with the application of a handful of key terms of exclusion in home insurance policy relating to the maintenance of a property.

The first signs that insurers were over-relying on defect, maintenance, wear and tear and pre-existing damage exclusion clauses came with the series of extreme weather events beginning with the Black Summer bushfires in November 2019 across extreme weather events culminating in Cyclone Seroja April 2021. When Financial Rights examined the over 700 requests made for assistance from the Insurance Law Service from these events in its 2021 report Exposed: Insurance problems after extreme weather events, complaints relating to insurer reliance on defect, maintenance, wear and tear and pre-existing damage clauses was the third most common issue raised, and the second most common issue raised for those impacted by storms.[2]

Defect, pre-existing damage, maintenance and wear and tear clauses and the range of issues faced by consumers relating to these terms were also raised by consumer groups to industry and government with extensive evidence of poor consumer outcomes in subsequent reports and submissions including:

- Financial Rights Legal Centre, Standardising General Insurance Definitions, March 2022 which found the definitions of "wear and tear" and "maintenance" were largely undefined, although some policies gave some examples of appropriate maintenance and the terms were subject to the highest level of lack of clarity and subjectivity.[3]
- Financial Rights and Legal Aid Queensland, Presentation to ICA Consumer Day, Maintenance, wear and tear and defect clauses, 2 May 2023 (Unpublished)
- CHOICE, Weathering the Storm: Insurance in a changing climate, August 2023
- Joint consumer submission to the Parliamentary Inquiry into insurers' responses to 2022 major floods claims, November 2022[4] and other submissions including from Disaster Legal Help Victoria. This includes case studies that:

[2] See pages 27 to 30, Financial Rights, Exposed: Insurance problems after extreme weather events, July 2021. This report provides four case studies that detail common scenarios that we hear on the Insurance Law Service

[3] Referenced in the ICA Application at 3.2, page 6

[4] See specifically pages 25 to 32 and 46 to 48.

    - show assertions of maintenance and defect problems with no causal link, despite evidence and receipts of recent work[5] even by the insurer themselves[6]
    - demonstrate a reliance on a maintenance exclusion after rain events of such magnitude that any newly installed gutters or downpipes were unlikely to have been sufficient in any case[7]
    - evidence insurers asserting exclusions despite the customer having no ability to identify a problem in the first place[8]
- Joint consumer submission to the Treasury consultation re: Standardising natural hazard definitions and reviewing standard cover for insurance, April 2024

The issues were also examined by the CGC[9], ASIC[10] and the final report of the Parliamentary Inquiry into insurers' responses to 2022 major floods claims[11], as also outlined in the ICA Application.

The ICA's Application highlights *some* of the issues identified by consumer groups, regulators and government regarding the application of "maintenance" and "wear and tear exclusions" in the home insurance market.[12] Summarising these from the Application, they are:

- Consumers are confused by the variability of definitions for "maintenance" and "wear and tear exclusions"[13]
- Consumers do not fully understand what is expected of them to avoid these exclusions[14]

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[5] Case study 11 and 12, Joint Consumer submission to the Parliamentary Flood Inquiry, 2022
[6] Case study 14, Joint Consumer submission to the Parliamentary Flood Inquiry, 2022
[7] Case study 16, Joint Consumer submission to the Parliamentary Flood Inquiry, 2022
[8] Case study 30, Joint Consumer submission to the Parliamentary Flood Inquiry, 2022
[9] General Insurance Code Governance Committee, *Making better claims decisions: A thematic inquiry*, July 2023
[10] ASIC, *Navigating the storm: ASIC's review of home insurance claims* (Report 768), August 2023
[11] House of Representatives Standing Committee on Economics, *Flood failure to future fairness: Report on the inquiry into insurers' responses to 2022 major floods claims*, 18 October 2024
[12] See 3.1-3.4 Background to the ICA Application.
[13] E.g. Para 3.2 "consumers are confused as a result of inconsistent definitions of ["maintenance" and "wear and tear exclusions"], see also Para 3.3
[14] E.g. Para 3.2 (a) ASIC report, o E.g. "wear and tear and maintenance exclusions are not well understood by consumers" [including] ...:
- If their property requires maintenance
- What the obligations to reasonably maintain their property entails
- That a claim can be denied due to the condition of their property if they fail to meet this obligation"

... [T]his led to unmet expectations and dissatisfaction when ... the claim [is] denied].
see also Para 3.3 "

- A high proportion of claims are being denied on the basis of "maintenance" and "wear and tear exclusions"[15]
- Claims assessments are inherently subjective and consumers do not understand the exact scope of coverage [16]
- "Maintenance" and "wear and tear exclusions" are poorly explained[17]

These are the issues that the ICA suggest are central to the ASIC Report, Committee Report and the feedback received from consumer advocates" – feedback that led to the work to develop Standard Definitions that constitute the Proposed Conduct in this application.

We agree that these capture many of the issues that consumers face with respect to these terms and need to be addressed, However, it is important to note that the issues outlined by the ICA are only a *subset* of the problems that have been raised. There are a range of additional concerns, some of which are *the* key elements that drives poor consumer outcomes and harms. These have been raised by consumer groups and others since 2021.

While we note that the ICA may wish to only focus on this subset of issues that they would like to address with the Proposed Conduct, it is important for the ACCC to understand the full range of issues that are at the heart of the "maintenance" and "wear and tear exclusion" problem in order to gain a more complete picture of the real problem that is needing to be addressed and resolved.

These are:

- **Insurers, assessors and experts assert a lack of 'maintenance' or 'wear and tear' with little to no evidence placing the onus on the consumer to refute a claims denial**

  Consumer groups have long held that one of the key issues that consumer face is the subjective reliance by insurers asserting that defects, poor maintenance of wear and tear led to the damage being claimed on – with no evidence of a causal link.

[15] E.g. Para 3.2 (b) Committee Report ""maintenance" and "wear and tear" formed 55% of all claims denials"

[16] E.g. "due to the inherent subjectivity in claims assessments …. [insureds] are unaware of what they should do to avoid an exclusion" because "subscriber [insurers] may apply these exclusions differently" Para 3.2 (b) Committee Report; see also Parliamentary Flood Inquiry Report [4.34]. Also see paragraph 3.1 of the application "It is important for consumers to know the exact scope of these exclusions so that they understand the true coverage provided by the home insurance policies at the time of purchase and throughout its life, enabling them to make informed purchasing and maintenance decisions."

[17] E.g. "the level of acceptable maintenance is often poorly explained in the policy terms and conditions." Para 3.2 (b) Committee Report

The Parliamentary Flood Inquiry detailed

> *"repeated accounts of claim denials based on exclusions where the expert report did not explain how the poor maintenance or wear and tear resulted in the observed flood damage, or did not sufficiently provide evidence to verify there was a causal link."*[18]

Insurers don't explain what maintenance should have been done, don't explain how that maintenance would have made a difference and don't show causation between lack of maintenance and the end result.

The subjective nature of these terms and the lack of clarity brought by vague and undetailed definitions (if any) has led insurers to almost apply them at will.

In so doing, the onus has been shifted from the insurer to the consumer to obtain evidence refuting an assertion based on 'maintenance' or 'wear and tear' including expensive and hard to obtain independent reports. Furthermore, the Parliamentary Flood Inquiry heard evidence of the lack of options for policyholders to share the maintenance they have conducted or report on the condition of their properties to their insurer before a claim is lodged.

- **Policyholders are unaware of the defects to their property**

  Policyholders do not have the expertise to recognise issues with their property and that building standards may change over time—which insurers may use to assert a defect clause and deny a claim. This reinforces the need for clearer expectations of reasonable condition for elements of properties.[19] While the ICA have referenced the issue, it has not sought to address it.[20] As will be outlined below, this issue can and must be addressed by the development of a Standard Definition.

- **Maintaining a house comes with an added cost to consumers that is not clearly disclosed to policyholders.**

  One of the key findings of Grace and Platow's *Standardising general insurance definitions* research was that these exclusions come at a cost that is not spelled out for policyholders.

  > *these exclusions and qualifications are all associated with consumer behaviour, to undertake maintenance and thereby prevent wear and tear, and involves an additional cost to consumers beyond the monetary fees paid for the insurance premium. These costs will be incurred in the form of consumers' time and effort, as*

[18] Paras 4.63-80 of the Parliamentary Flood Inquiry Report
[19] Para 4.53 of the Parliamentary Flood Inquiry Report
[20] See Page 8-9 of the ICA Application.

well as financially through the provision of additional resources and/or personnel (e.g., hiring someone to clear roof gutters) to support these actions.

Explicating these additional costs to consumers is extremely important. Although participants .. indicated willingness to engage in many of these behaviours, it became clear that the primary if not sole perceived cost to them is simply the insurance premium, Basically people believed that the payment of the premium buys the insurance coverage without further costs which is not correct.

What also became clear in the focus groups is that the scope of these behaviours remains vague in consumers' minds; they just do not know how much effort needs to be invested to satisfy the subjective decision-making of insurance assessors.[21]

- **Many disputes in relation to fair wear and tear and maintenance exclusions occur in relation to older properties**

  Older properties cannot be expected to be in perfect condition compared to a newer build that adheres to better standards, and that this needed to be considered and communicated as part of reasonable maintenance expectations.[22]

- **Insurers do not disclose to policyholders upfront that certain elements of a property are an issue**

  The lack of disclosure from insurers at the beginning of an insurance product's life has caused frustration for many policyholders.[23]

- **Insurer staff display limited understanding of maintenance clauses in their own policies leading to inconsistent and subjective application**

  Our experience is that there is limited understanding by insurance staff of maintenance clauses in their own policies. This means they are inconsistently applied. Further they are asserted as a go to response without sufficient evidence. This is in addition to there being no consistent approach to maintenance and wear and tear exclusions across the industry.

By focussing on only some of the issues to the exclusion of other key issues faced by consumer – the application obscures a number of flaws with the Proposed Conduct. This submission outlines these flaws under **The Proposed Conduct** section below.

[21] Paras 27.2-27.4 Grace and Platow, Standardising general insurance definitions March 2022
[22] Para 4.52 of the Parliamentary Flood Inquiry Report
[23] Para 4.54 of the Parliamentary Flood Inquiry Report

However, the ICA shifts from the bundle of issues that it has summarised, to outline that their Proposed Conduct seeks to "*substantially* address recommendations 1 and 2" (our emphasis) of the Parliamentary Flood Inquiry to [realise] the benefits from the Proposed Conduct as soon as possible." The Application also notes that the ICA and its members continue to consider where there are other recommendations that are suitable for an industry-wide approach.

Before getting to the flaws in the Proposed Conduct, it is worth examining what the ICA assert are the Parliamentary Flood Inquiry Recommendations they seek to substantially address.

The Parliamentary Flood Inquiry Recommendations and the Proposed Conduct

Recommendation 1

We note that the ICA have only quoted the second dot point of Recommendation 1 and have not included the overriding clause of the recommendation. The Recommendation in full is as follows:

> *4.113 The Committee recommends the Australian Government define the following terms in the Insurance Contracts Act 1984:*
>
> - *All major forms of water damage, including "rainfall runoff", "storm surge", "tidal surge" and "riverine flood".*
> - *Key terms relating to exclusions relating to the maintenance of the property including "wear and tear" and "lack of maintenance". The Committee recommends that the Insurance Council of Australia accelerate its work with the Australian Competition and Consumer Commission in developing and approving the standardising of these terms and that consumers be provided with greater clarity in relation to the meaning of "pre-existing defect and/or damage".*

Our understanding of the full recommendation is that:

- the Australian Government should define a series of terms *including* "key terms relating to exclusions relating to the maintenance of the property including "wear and tear" and "lack of maintenance""
- the ICA and the ACCC accelerate work in developing and approving key terms related to the maintenance of the property *including "wear and tear" and "lack of maintenance"*

- the ICA provide clarity with respect to the meaning of "pre-existing defect and/or damage"

We make the following observations that arise from this:

- The ICA have not referenced the recommendation that the terms at stake in this application should be defined in the *Insurance Contract Act 1984*. This is central to the consumer movement's consistent position – referenced by the ICA in this application - that these terms be legislatively defined.

- The ICA have focussed solely on defining two terms "wear and tear" and "maintenance" to the exclusion of other related terms that are central to the bundle of concepts related to the maintenance of a property being insured. The recommendation is a non-exclusive list that *includes* "wear and tear" and "maintenance" but suggests that there are further terms in the bundle that need defining – terms that we note have not been addressed by the proposed Standard Definitions. These additional terms include the related but distinct concepts of "pre-existing damage" and "defect." The consumer movement have made recommendations to the ICA and repeat these recommendations below that the Proposed standard terms can easily be amended to capture and address these concepts to the fulfillment of this part of the recommendation.

- The ICA is recommended to provide clarity to "pre-existing defect and/or damage" however the Proposed Conduct fails to do this either in the proposed Standard Definition or the Education Campaign – choosing instead to solely focus on "maintenance" and "wear and tear". These are concepts that are critical to the concept of maintaining a property that need to be addressed otherwise it is likely that insurers will simply shift their over-reliance on "maintenance and wear and tear exclusions" on to these concepts. Again, the consumer movement have made recommendations to the ICA and repeat these recommendations below under the **Proposed Conditions** of this submission that the Proposed standard terms can easily be amended to capture and address these concepts to the fulfillment of this part of the recommendation.

Recommendation 2

We note that the ICA have again only quoted the second dot point of Recommendation 2 and have not included the first dot point of the recommendation. Recommendation 2 in full is as follows:

> *4.114 The Committee recommends that:*

- *the Australian Government legislate a requirement for general insurers to provide policyholders with information regarding insurers' expectations of policyholders conducting "reasonable maintenance" to their property and the potential consequences for claim outcomes if a reasonable level of maintenance is not undertaken, and*
- *the Insurance Council of Australia in conjunction with the Australian Securities and Investments Commission and key consumer group representatives develop clear guidance regarding 'reasonable maintenance' across insurers, including for roofs, gutters, fences and stumps.*

Our understanding of the full recommendation is that:

- The Government should legislate a requirement for general insurers to provide information on insurer expectations regarding "reasonable maintenance" and
- as a part of that the ICA work with ASIC and key consumer groups to develop that guidance.
- That guidance should include (but not limited to) information relating to roofs, gutters, fences and stumps.

We make the following observations that arise:

- The ICA have not referenced the recommendation that the Government legislate the requirement. We continue to hold the view that that the Government should legislate this requirement and work be conducted on developing this information.
- The ICA previously provided consumer groups with a two-page high level document with information regarding their education campaign proposal. We were not provided with the additional material and detail that has been included in the authorisation[24] until the public release of this application on the register. We have subsequently yet to have been provided any opportunity to comment on either the key messages or minimum content outlined in the Application until now, nor have we been provided with any material relating specifically to the issues identified in the recommendation relating to roofs, gutters, fences and stumps. This despite significant available time in the lead up to this consultation.
- The Education Campaign does not include any reference to "pre-existing defect and/or damage"
- The ICA acknowledge that "stumps" will not be addressed – despite the specific recommendation. Stumps were brought up as a specific issue in the Parliamentary

[24] At pages 16-19 of the ICA Application

Flood Inquiry and are a critical practical component of the bundle of requirements to maintain a property.

Recommendation 3

The ICA acknowledge Recommendation 3 of the Parliamentary Inquiry in the Application but do not seek to address the issue in the Proposed Conduct because it would

a) involve a "significant expansion of the scope of insurance coverage"
b) it "extends far beyond the specific concerns relating to maintenance and wear and tear that the Proposed Conduct is seeking to address" and
c) it has significant cost implications

Recommendation 3 states:

> *4.115 The Committee recommends that a distinction be made in the General Insurance Code of Practice (the Code) between aspects of properties where maintenance is:*
>
> - *Observable (for example, roofs and gutters) versus where it is not observable (for example, typically, stumps).*
> - *Where regular upkeep is reasonably within the remit of the householder or business versus where maintenance is infrequent, costly and highly irregular (for example, stumps).*
>
> *Where maintenance is not observable and infrequent maintenance is required, there should be a presumption of coverage by insurers unless exceptional circumstances can be established. It should be noted that this may have an impact on premiums for some policies (for example, for older houses) but that the trade-off is that it will reduce the likelihood of dramatically different outcomes for households with the same experience from the natural disaster while making no difference to the observed risk or behaviour of policyholders. This presumption should be reflected in the industry-wide guidance issued under Recommendation 2.*

While we accept meeting this recommendation may "significant expansion of the scope of insurance coverage" we do not agree with the ICA on the two further issues.

Firstly, while the recommendation may extend "far beyond the specific concerns relating to maintenance and wear and tear that the Proposed Conduct is seeking to address" this is purely on the basis that the ICA has chosen to limit the Proposed Conduct in that way.

It is our position that Recommendation 3 does not extend "far beyond the specific concerns relating to maintenance and wear and tear". In fact, Recommendation 3 is key in addressing

one of the core concerns related to the issues of maintaining a home – that is policyholders are fundamentally unaware of defect, wear and tear or defect issues impacting their property.

Consumer groups have considered this issue closely with respect to the development of the proposed Standard Definitions and provided the Insurance Council with a straightforward way of addressing the issue in the bundle of terms being defined. See below under the **Proposed Conditions** section.

The Proposed Conduct

The ICA's Proposed Conduct is made up of two distinct forms of conduct:

- the adoption of standard definitions for "reasonable maintenance" and "wear and tear", and
- implementation of an education campaign compromised of an ICA -developed and led campaign and an insurer led campaign.

It is our position that there are fundamental flaws in the Proposed Conduct – specifically with respect to the standard definitions, flaws that are significant enough to warrant our opposition to the Application. We detail these flaws below.

There is no guarantee that any insurer will adopt the proposed Standard Definitions in their home insurance policies

The ICA make clear in its Authorisation that adopting the proposed Standard Definitions is voluntary and does not guarantee that any insurer will in fact adopt the Standard Definitions.[25] We note that the ICA does not identify the extent to which it expects its members to take-up the proposed Standard Definitions.[26]

This lack of certainty undermines the key reason the ICA puts forward for the need for a set of Standard Definitions addressing maintenance of homes – that is, addressing consumer confusion arising from the variability of definitions and the inability to compare.

The Proposed Standard Definitions do not standardise the scope of coverage

The ICA Application is clear that the proposed Standard Definitions do not standardise the scope of coverage. The "Reasonable steps to maintain" definition states:

> "*Please refer to [Clause X of this document] for information about the exclusion that relates to your obligation to maintain your [home I insured property*".

[25] Page 1 of the ICA Application: "The Proposed Conduct will not have any meaningful impact on competition for the supply of home insurance products in Australia because each Authorised Party can choose whether to adopt the Standard Definitions in their home insurance policies."
[26] We note that this was at issue in the 2008 ICA Application see: 6.59 of the Application for authorisation lodged by Insurance Council of Australia in respect of an agreement between its members to adopt, on a voluntary basis, a common definition of "inland flood": Determination, 3 September 2008, Authorisation no.: A9 1086

As acknowledged in the Application consumer groups had provided feedback on the proposed Standard Definitions that the ICA felt "went beyond the scope of the proposed conduct."

We note that this was not the original approach taken by the ICA in developing the Proposed Standard Definitions in the Application which had previously addressed causality and scope of coverage.

Not standardising the scope of coverage of the terms – the key aspect of a term of exclusion that needs defining - undermines the entire point of standardisation. The proposed Standard Definitions will allow insurers to still compete on the scope of maintenance and wear and tear exclusions and consequently the *application* of these terms of exclusion will continue to vary.

This means that despite there being a "Standard Definition" two people in identical situations could (or are even likely to) have very different outcomes from the application of a wear and tear or failure to maintain exclusion.

For example, one person, covered by an insurer who excludes loss or damage caused directly or indirectly by, arising from or in any way connected with 'wear and tear' will have their claim denied. The other, otherwise identically situated person, but covered with an insurer who simply excludes damage "caused" by wear and tear, (that providing a nexus of proximate cause as opposed to some more attenuated or indirect cause) may have their claim accepted or partially accepted. These different outcomes demonstrates that the standardisation proposed will be illusory.

This was not the intended outcome expected in the Parliamentary Recommendation.

It also contradicts the ICA's application, which states that proposed conduct will assist consumers to:

> *"know the exact scope of these exclusions so that they understand the true coverage provided by the home insurance policies at the time of purchase and throughout its life, enabling them to make informed purchasing and maintenance decisions."*

On the contrary, consumer will not know the scope of these exclusions based on the Proposed Conduct.

There are two elements to the scope of coverage issue that need to be addressed:

- modifications to the causal requirements inherent in maintenance and wear and tear exclusions to extend the cope of coverage, and
- the inclusion of a presumption of coverage placed upon all insurers where maintenance is either non-observable or is infrequent, costly and highly irregular.

Causality

As outlined above, policyholders face claim denials based on exclusions where insurers do not explain how the poor maintenance or wear and tear resulted in the damage, or do not sufficiently provide evidence to verify there was a causal link.

Proximate cause is central to the nature of application of maintenance and wear and tear exclusions.

Failure to maintain an item should not be able to be used to deny a claim where any failure to maintain is unrelated to the damage; that is, is not the proximate cause of the damage. For example, damage to a roof caused by hail or a fallen branch should not be denied because of a failure to maintain the roof, if damage would have occurred even on a well-maintained roof. Or if a storm has been found to be an event that caused some damage, but a rusted roof caused the ceiling to be damaged in the event, the insurer would currently exclude the roof repairs due to the rust. But if the proposed maintenance definition is implemented, it may be used assert all damage is not covered due to a lack of reasonable steps to clear gutters or fix rust on roof, even if it wasn't the proximate cause.

By not addressing causality in the wear and tear definition too, the proposed Standard Definitions lacks an acknowledgement that there can and will always be a level of "reasonable" wear and tear that should not enliven an exclusion. A wear and tear exclusion should only be enlivened when the wear and tear is significant enough to be a proximate cause of the loss.

Causality is the crucial to prescribing what is and what is not covered. Without this key element, the inconsistency and confusion currently faced by consumers will simply remain.

Observability

'Wear and tear' or need for 'maintenance' should be something a policyholder could reasonably have observed without excessive diligence or expert knowledge.

The issue is particularly important in respect of the observability required under the proposed maintenance clause as, unlike the wear and tear clause, the maintenance clause places an obligation on the insured to take some form of action during the policy period.

The actions required must be reasonable in all respects, that including the scope and cost of any such repairs and when the obligation arises.

In this respect, the maintenance definition should be conditioned on actual knowledge of the need for maintenance in respect of an "issue" which first arose during the policy period (what the insured actually knew) rather than constructive knowledge (what the insured ought to have known or would have known on reasonable enquiry) of the "issue" during the policy period.

If actual knowledge is not adopted as the standard of observability, this will invite disputation (and litigation) as to what a homeowner should have known where insurers can allege such constructive knowledge on an unrealistic or unreasonable basis based on some "objective standard" formulated after the loss has been suffered.

This will also prevent disputation (and litigation) about non-disclosure by the insured of any maintenance issue prior to inception of the policy.

In that respect, it is suggested that insurers should not be permitted to use either of the proposed Standard Definitions as the basis to allege non-disclosure.

Requiring actual knowledge would both be in line with Recommendation 3 of the Parliamentary Flood Inquiry and would address the issues faced by consumers. The Parliamentary Inquiry stated that

> *Another area where policyholders face considerable risk is where the pre-existing condition of a material aspect of the building is unobservable. The most common example of this identified during the course of the inquiry was stumps. Policyholders often pay premiums for decades with neither the insurer nor the insured knowing the state of the stumps. It is understandably frustrating when, after a flood, the floorboards are taken up and an insured person or family is told that they will not be paid out due to the condition of the stumps. This aspect of coverage almost becomes a lottery. One could argue that too much of the responsibility for the condition of this aspect of the property is placed on consumers not aware that this is even an issue. Arguably, the underwriting of this risk is occurring after the event rather than at the time the policy is obtained. The Committee recognises that insurers should not assume the risk of all pre-existing damage. This would be inefficient and lead to higher premiums. But stumps are a tightly definable example of where there is currently too much risk being placed on households which could be pooled better. The Committee recommends that insurers should take this responsibility on unless clearly specified otherwise.*

The committee concluded that:

> *Where maintenance is not observable and is highly infrequent, the Committee is of the view that there should be a presumption of coverage by insurers unless exceptional circumstances can be established. It should be noted that this may have an impact on premiums for some policies (for example those with older houses) but that the trade-off is that it will reduce the likelihood of dramatically different outcomes for households with the same experience from the same natural disaster but no difference in their observed risk or behaviour. It may be that such a presumption may need to be limited to specific elements of buildings (for example, stumps).*[27]

While Recommendation 3 does suggest the General Insurance Code of Practice address the issue of observability – the ICA has stated in its Industry Action Plan that

> *The Code cannot prescribe terms and conditions of product coverage and competition law prevents insurers from taking a consistent approach.*[28]

The ICA then point to this proposed Application as the sum total of addressing Recommendation 3. In other words, unless addressed here, Recommendation 3 is unlikely to be addressed at all by the industry in the Code.

As with the causality point above, without addressing the scope of coverage the definition does no work to address the key issues arising from the application of these terms of exclusion to claims.

The Proposed Standard Definitions do not address the reasonableness as to scope and cost of repairs

The proposed maintenance definition also provides no protection form the insurer relying on a breach of the obligation to repair where the maintenance required comes to light during the policy period and the homeowner is, for whatever reason, unable to perform the repairs needed as they face insurmountable obstacles in terms of such things as:

- cost: which depends on the economic circumstances of the individual homeowner) and
- regulatory approval: the nature of the maintenance required is not a "simple fix" and work which is far greater than the maintenance issue itself is required because, for example, compliance with the Building Code of Australia is required (this is a particular issue with older homes).

[27] Para 4.110, page 73 of the Parliamentary Flood Inquiry Report.
[28] ICA, General Insurance Industry Action Plan: Our response to recommendations for change, March 2025

The Proposed Standard Definitions do not address critical related terms "pre-existing damage" and "defect"

The ICA have chosen to limit this application to the terms "maintenance" and "wear and tear." However, these are just two phrases of exclusion that insurers use that relate to the same set of exclusions. As mentioned above, the other two phrases that are used in a similar fashion and relate directly to the need the state of a property are "pre-existing damage" and "defects" or "building defects."

The competitive nature of insurance has led to a large variety of naming conventions for similar if not exactly the same set of concepts. This is not an uncommon issue.[29]

However, when looking to standardise a key term it is critical that the related bundle of concepts are also captured and/or addressed. If they are not, they remain available to insurers to rely upon and apply in additional, subjective ways. In other words, if "maintenance" and "wear and tear" are to be effectively standardised then insurers will simply shift to related concepts of pre-existing damage and/or defects to exclude claims related to the state of a property. These concepts are undeniably linked to the concepts subject to the Proposed Standard Definitions in this Application.

Failing to address these definitions will ensure that consumer will continue to be confused, and will lead to unwelcome surprises at claims time when these unaddressed exclusions are applied.

The proposed list of example 'reasonable steps' have the potential to be used against insureds

We appreciate the ICA's is attempting to flesh out the meaning of these fraught concepts with examples. However, we cannot support such a list appearing in the contract of insurance itself, for a number of reasons.

The list of reasonable steps is likely to be used against insureds at claims time. In our experience, claims staff may deny the claim if even one of a list of examples is present. The ICA have previously provided an assurance to consumer groups that there these lists will not be used as a checklist to refuse claims. However, these assurances seem at odds with the

[29] Page 4 of the submission to the Treasury consultation on Standardising Natural Hazard Definitions points to the example of Escape of liquid" which is referred to as various "Water or other liquid damage", "Water or liquid damage", "Sudden and unexpected escape of liquid at the insured address …" "Bursting, leaking or overflowing", "Water and Oil leaks", "Water or other liquid", "Bursting, leaking, discharging or overflowing of water or liquid" "Liquid or water damage" and "Escaping water

drafting of the lists, which are silent as to causality and the fact that not every instance of mould, rust etc will constitute wear and tear or be indicative of a failure to maintain.

Consumers need specific guidance on maintaining a property or greater clarity as to what "wear and tear" involves. The contractual definition is however not the appropriate forum to deliver this information. The examples are best included in educational materials that will support policies and any updated definitions. Doing so would more appropriately assign the intended roles of a standard definition and an education campaign to address the issues identified.

At the very least, the drafting must clarify that the list are mere examples of things that may (rather than always do) indicate wear and tear or a lack of maintenance.

The ICA's Application states that consumer group feedback not to include the list of examples in the definition was not incorporated because it "would … make the clauses more difficult for consumers to understand"[30] They also state that this was also contrary to feedback from AFCA.

We cannot speak to AFCA input on this matter but as outlined above we maintain that their inclusion will lead to poorer outcomes for consumers.

Specific terminology used in the proposed Standard Definitions introduces further vagaries and complexity

We continue to hold concerns with respect to specific terminology being used in the proposed Standard Definitions which introduces further vagaries and potential complexity.

For example,

- "good working order"
  It is not clear what the difference is between "good working order" and simply "working order"

- "worn" versus "deteriorating"
  The adjective "worn" is used four times and "deteriorating" or "deterioration" used three times, which adds a level of ambiguity that will need clarification. For example, can does "Wear and tear" exclude a "worn fence" but include a "deteriorating fence"?

[30] Page 21 of the ICA Application

- "Any other steps that may reasonably be expected in the circumstances"
  This is, in effect, a get out of gaol free card to develop any step that insurers can subjectively assert are reasonable.

- "any other normal and gradual deterioration"
  Similarly this in effect a get out of gaol free card to develop any step that insurers can subjectively assert are reasonable.

- "damage to walls … repaired," or "breakdown of grouting, silicone tiles and tile adhesive"
  These concepts may be caused by other covered events under the policy such as earthquake, impact or storm in the case of wall damage, and escape of liquid in the case of grouting etc breakdown. This has the potential to lead to disputes.

- "ordinary effects of weather and the natural environment"
  This phrase introduces ambiguity and confusion into the exclusion, particularly given many of the events covered as insured events in the policy are weather events (storm, flood etc). One key concern is that section could be used to exclude storms in areas that have become very storm, fire or flood prone due to climate change. That is when – if ever - does this become the 'ordinary' effect of weather?

The Proposed Standard Definition for "maintenance" does not reference section 54

The Proposed Standard Definitions do not reference the fact they are subject to Section 54 of the *Insurance Contract Act 1984*. This is not an insignificant issue. Section 54 prevents insurers from denying claims on the basis that the policyholder breached a policy term or failed to act after the policy was incepted, unless the act or omissions caused or contributed to the loss and only then to the extent it has caused prejudice to the insurer. There should be specific acknowledgement in the policy wording that the Proposed Standard definitions should be construed as relating to post-inception acts and omission which are subject to section 54.

This is particularly important where the ACCC is being asked to consider the Proposed Standard Definitions in isolation as opposed to within any particular form of wording. This creates the risk that, depending on the wording of the policy actually issued, the Proposed Standard Definitions will not be subject to section 54.

Section 54 is a pro-consumer section that empowers policyholders to argue that insurers can't refuse claim solely on acts or omissions after inception. If the Proposed Standard Definition is introduced as a standard form clause rather than a mere post-inception

'condition', there is a risk it will be interpreted as a condition precedent to indemnity, such that consumers may not be able to rely on the protection section 54 affords them.

By not making explicit that the application of Section 54 remains, the proposed definition further muddies the water with regards to requiring a causal and evidential link between the lack of maintenance, and the loss arising from the event.

Deeming the Proposed Standard Definition for maintenance as a condition to which Section 54 applies, but not a condition precedent to indemnity, are both required to ensure that Section 54 continues to apply.

The ICA's Application states a reference to Section 54 was not incorporated because it "would add complexity and make the clauses more difficult for consumers to understand."[31] By far the greater risk and concern is that the form of the policies incorporating the Proposed Standard Definitions are construed by the Court to not be subject to section 54 thereby depriving the policyholder of an important statutory remedy.

While any cross reference to legislation does complicate matters, as outlined above, the reference is necessary to maintain consumer protections in the application of "maintenance" exclusions.

The Proposed Standard Definition does not limit maintenance issues or wear and tear to those known or occurring in the coverage period

The Proposed Standard Definition makes what has long been implicit in consumer home insurance explicit: that insurers do not take your home as they find it at the start of the policy; rather, insurers require consumers—sitting at home, with no relevant expertise or frame of reference—to warrant that their home is in a near-perfect state of repair in order to obtain insurance.

Insurers then insure and charge premiums on the basis of that (mandated) warranty but preserve to themselves the right to pick apart every pre-existing issue or minor maintenance problem come claim time.

This is not how insurance works. An insurance product is a contract to insure a property during a coverage period with a start and end date. The maintenance obligation and the wear and tear exclusions must apply to maintenance issues and the wear and tear that

[31] Page 21 of the ICA Application

occurs from the start of the insurance period that comes within the actual knowledge of the insured during the policy period, not from some undetermined time before the contract.

The proposal fundamental ignores this fundamental element of the insurance contract.

An Education Campaign will not address the key issues consumers

As outlined above, the work that the Proposed Standard Definitions do is limited in that it does not address issues of scope of coverage. In doing so, the definition has little work to do other than that that could be obtained through an education campaign.

While consumer representatives support the introduction of an education campaign to address the lack of understanding regarding what is expected of them when insurers assert exclusions based on the bundle of terms related to maintaining a property, we do not think an ACCC Authorisation is required for this activity.

The education campaign is also limited by not explicitly addressing "pre-existing damage" and "defects". Not does the education campaign plan to clarify that maintaining a property means that there are costs additional to the annual premium.

We also do not think a financial literacy campaign alone will address the issues outlined above since it places the onus back on to consumers to understand what is and what may potentially be required of them and understand that that entails costs in addition to the premium.

We note that it has been understood for some time that disclosure – while necessary – is insufficient as a protection measure to address consumer harms.[32]

[32] The ASIC and Dutch Authority for the Financial Markets (AFM) joint Report 632: Disclosure: Why it shouldn't be the default, 2019

What benefits arise from the Proposed Conduct?

Putting aside the flaws and taking on face value the proposed Standard Definition and Education campaign, the benefits of the Proposed Conduct as presented are minimal at best. We identify and comment upon these benefits below.

The Proposed Standard Definitions could improve understanding of what is expected of policyholders

While there is some potential for the Standard Definitions as proposed to improve understanding of what is expected of policyholders, that understanding it limited to merely an understanding of the two concepts rather than an understanding of how the concepts will be *applied* at claims time, since they do not touch upon scope of coverage.

Defining these concepts is an improvement from the minimal information provided currently however given the unlimited nature of the examples listed, it is not a complete picture and will likely still lead to surprising (and most likely poor) outcomes at claims time for consumers.

Furthermore, the definitions merely do some of the work that an education campaign can, and more appropriately should, do.

An education campaign will be of use to consumers to better understand what is expected them

Consumer groups have long sort more information from insurers regarding what the terms "maintenance" and "wear and tear" mean and what is required to meet them (including their additional financial impact).

The Education Campaign proposed goes some way to address this issue and is welcomed. However, an education campaign can take place now, without an ACCC Authorisation.

Harmonisation of a subset of terms relating to the maintenance of a property can provide some clarity to policyholders

Any simplification and harmonisation of terms of exclusion that are common (and commonly relied upon by insurers) in an environment of significant complexity and variation is a positive step. The more the better.

However, the Proposed Standard Definitions are (as outlined above) limited in scope and thus correspondingly limited in benefit to consumers.

Harmonisation could reduce difficulties in comparing products

Again, any harmonisation of key terms of exclusion will assist consumers by reducing the number of elements they need to compare to be able to make a fully informed choice to purchase a home insurance product.

However again, the Proposed Standard Definitions are (as outlined above) limited in scope and thus limiting the subsequent potential benefit in a corresponding fashion. Policyholders will remain confused and in the dark with respect to how these terms will be applied at claims time.

There may be some reduction in the number of ineligible claims and complaints made under home insurance policies

It is conceivable that there will be claims where a dispute is avoided because consumers are better informed by an education campaign regarding what is expected of them in maintaining their property.

However, given the unlimited nature of the examples provided and the fact that coverage and the application of causality will still vary significantly in subjective and multiple ways (issues at the heart of most disputes in this area) the benefits touted are again likely to be limited.

What detriments arise from the Proposed Conduct?

The Proposed Conduct will increase rather than decrease consumer confusion

The Proposed Conduct will increase confusion for consumers in a number of respects.

Consumers will be given the impression that there will be one definition for these terms when this is unlikely to be the case

As made clear in the ICA's Application, there is no guarantee that all or any insurer will adopt the Proposed Standard Definitions in their home insurance policies. This means it is highly likely to be ongoing variance in the market.

It is not clear from the Application how consumers will know which insurers have adopted the Proposed Standard Definitions and which have not. This adds a layer of complexity and confusion.

Consumers may be under the false impression that a standard definition for these terms will lead to more consistent outcomes

As outlined above, by not standardising scope of coverage or clarifying the role of causality in the definitions, consumers are likely to be under the false impression that that the Standard Definitions will lead to more consistent outcomes. More consistent outcomes are unlikely to arise since the drafting maintains significant variation in the ability of insurers to apply exclusions differently according to their risk appetite as expressed elsewhere in the contract.

Consumers may be under the false impression that issues of "pre-existing damage and/or defect" will be made consistent when they are not

The Application claims to address issues of pre-existing damage and/or defect when it does not. If this assertion continues through to the education campaign, consumers may be confused.

Consumers may believe the list of examples in the Proposed Definitions are the sum total of expectations when they or may not be

Listing the examples of reasonable maintenance and wear and tear may provide the impression to consumers that this is what is expected of them and many can be under the misimpression that this will be the sum total of what is expected of them.

Depending on the other terms cross-referenced in the contract, this may or may not be the case and is depending on the risk appetite of each insurer and how each insurers addressed scope of coverage, causality and unobservability.

There will therefore remain many instances where consumers will be surprised at the outcome of a claim denied on the basis of a maintenance or wear and tear exclusion.

The Proposed Conduct introduces concepts which lack legal certainty

We have outlined several terms used in the Proposed Standard Definitions that are vague; will be subject to inconsistent and subjective application and will likely lead to confusion, disappointing surprises at claims time and inevitable disputes. The list of these is above under the **Proposed Conduct** section.

The Proposed Conduct may prevent consumers from relying on Section 54 of the *Insurance Contracts Act*

As outlined above, the proposed Standard Definitions are drafted in a way that risks interfering with Section 54 consumer protections.

The Proposed Conduct will embed the approach taken by insurers that they do not take your home as they find it at the start of an insurance contract

Again as outlined above, the Proposed Standard Definition for wear and tear will embed a quirk of the insurance market whereby insurers do not take your home as they find it at the start of the policy. Rather, insurers require consumers—sitting at home, with no relevant expertise or frame of reference—to warrant that their home is in a near-perfect state of repair in order to obtain insurance. Insurers then insure and charge premiums based on that (mandated) warranty but preserve to themselves the right to pick apart every pre-existing issue or minor maintenance problem come claim time. This is not how insurance contracts should work.

The Proposed Conduct will prevent the introduction of a simpler, more comprehensive set of Standard Definitions for key terms that will address the issues faced by consumers

We do not believe that the limited benefits that Proposed Conduct will bring in any way outweigh the detriments outlined in this submission.

If the Proposed Conduct were to go ahead it would also likely impede the development of more appropriate and comprehensive terms through a more independent, Government-led process. Clearly the work and consultation conducted by the ICA to achieve this Application has not led to set of Standard Definitions that all stakeholders can support.

If the Proposed Conduct were to go ahead, the issues we have raised will simply remain and potentially worsen outcomes for large numbers of policyholders in this market.

Finally, we direct the ACCC's attention to the ICA's 2008 Application for authorisation in respect of an agreement between its members to adopt, on a voluntary basis, a common definition of "inland flood" and the ACCC's Determination of Authorisation no.: A9 1086. We note that the ACCC ultimately denied that application on largely the same grounds outlined by consumer representatives in this submission.

Proposed Conditions

Consumer groups can only support the Proposed Conduct if the ACCC impose significant conditions on the ICA's Proposed Conduct. Without these conditions – consumer groups must oppose the application and call on the Government to intervene to address the issues at the heart of the Application.

Consumer groups put forward the following conditions

That the Insurance Council amend the Proposed Standard Definitions in several ways

During the consultation with the ICA between October 2024 and April 2025[33] consumer groups provided significant feedback and developed a counter proposal to the ICA's original drafting. A slightly amended version of that proposal is outlined at **Appendix A** and described below. It is our view that this counter proposal more fully addresses the issues at the centre of the maintenance and wear and tear issues seeking to be addressed by the Authorisation.

We propose the following amendments:

- **The maintenance definition should be a "condition" rather than a "clause"**

  The definition of "maintenance" must be introduced as a post-inception condition subject to Section 54 of the *Insurance Contracts Act*, rather than a clause and that these conditions are subject to section 54 should be explicitly stated. This is important as that clause imposes a post-inception obligation on the insured to take positive action.

- **The protections afforded by Section 54 of the *Insurance Contracts Act* should be explicitly referenced and linked to the definition**

  This is to ensure that there is a direct causal and evidential link between the lack of maintenance, and the loss arising from the event, and to make explicit the application of section 54.

  We note that the ICA have not incorporated these suggestions since they "would add complexity and make the clauses more difficult for consumers to understand."[34]

[33] supported in part with funding from the ICA to engage an external counsel for advice
[34] Page 21 or the ICA Application

We acknowledge that the language may do this but it is outweighed by the clear benefit to consumers in maintaining consumer protections in the *Insurance Contract Act* providing greater clarity to those consumers of their rights. Any complexity can and should be explained in Plain English in accompanying education materials.

- **Address causality in the definitions:**

  The definition of maintenance should include wording to the effect that:

  > *We will not cover you for death, bodily injury to any person, liability, loss or damage directly caused by your failure to maintain your [home / insured property]*

  Similarly, the definition of "wear and tear" should include wording to the effect that:

  > *We will not cover you for 'wear and tear', or for death, bodily injury to any person, liability, loss or damage directly caused by 'wear and tear'*

  These are intended to ensure that the insurer must establish the lack of maintenance, or wear and tear was a proximate cause of the loss arising from the event.

- **Address observability in both definitions**

  The definitions must address the issue of observability in the definition.

  As explained above, this includes a require for actual knowledge by the insured during the policy period of a maintenance issue which arises during the policy period as well wear and tear which occurs during the policy period being the subject of the exclusion is that definition. The following wording should be included:

  > *The obligation on you under this policy to repair and maintain your [home / insured property] throughout the period of insurance so that it is in the same, or substantially similar, state of repair as it was at the commencement of the period of insurance under this policy is limited only to repair and maintenance (excluding Latent Defects):*
  >
  > *a) of items or issues of repair and maintenance that first occurred during the period of insurance under this policy; and*
  > *b) of items and issues of repair and maintenance which you actually became aware of during the period of insurance under this policy; or*
  > *c) of items and issues that could reasonably have been identified or discovered by you in the ordinary course during the period of insurance*

under this policy where such identification and discovery does not include obtaining expert advice or opinion nor conducting extensive, intrusive or destructive investigations or inspections of your [home/insured property].[35]

In addition, we propose doing so via excluding from both definitions the effects of latent defects.

The definition of maintenance should include wording to the effect that:

Notwithstanding anything else contained in this clause, this clause does not apply to any Latent Defects which exist in your [home / insured property] at the commencement of the period of insurance under this policy and the cover under this policy includes the repair, reinstatement and rectification of any Latent Defect (or part thereof) provided such Latent Defect (or part thereof):

(a) is within that part of your [home / insured property] which suffers loss or damage that is otherwise covered under this policy; or,

(b) if a Latent Defect (or part thereof) does not form part of the loss or damage referred to in sub-paragraph (a), the repair, reinstatement and rectification of any Latent Defect (or part thereof) is reasonable or necessary as part of the repair, reinstatement and rectification of the loss or damage referred to in sub-paragraph (a).

The definition of "wear and tear" should also include wording to the effect that:

'Wear and tear' is the normal deterioration of your [home / insured property] or contents from ordinary, everyday use, or the passage of time, but does not include:

(a) …
(b) the effect(s) of any Latent Defect(s); or

Latent Defect means any defect, error or omission in the design, construction, commissioning and/or installation of your [home/insured property] which existed at the commencement of the period of insurance under this policy where such defect, error or omission:

[35] Note this drafting was not previously provided to the Insurance Council of Australia.

(a) *meant that the design, construction, commissioning and/or installation of your [home/insured property] was not, from the commencement of the period of insurance under the Policy, fit for purpose (in whole or part) and in accordance with any applicable Legislative Requirements (in whole or part); and*

(b) *could not have reasonably been identified or discovered by you in the ordinary course where such identification and discovery does not include obtaining expert advice or opinion nor conducting extensive, intrusive or destructive investigations or inspections of your [home/insured property].*

These amendments would neatly address the issue identified in the Flood Inquiry that there are issues with homes and property that are not readily apparent to consumers or that consumers cannot literally see or know.

In combination with the following recommendation to limit the scope of the definition to the period of insurance, these would also address the issues arising out of the bundle of other terms including "pre-existing damage" and "defects." The proposed drafting above would necessarily limit the scope of application to "patent defects" as opposed to "Latent Defects". Clause (b) under the Wear and Tear definition would go to the issue of needing to fix a latent defect subsequently identified.

We note too that the proposed definition refers to "Legislative Requirements." We propose that this would need to be defined to clarify the use of the term used in (a).

> *Legislative Requirements means all Commonwealth, State and Territory legislation which applies to, or regulates, the design, construction, commissioning and/or installation of residential or domestic dwellings or premises including, without limitation, the Building Code of Australia and the National Construction Code.*

We note again that the ICA have not incorporated these suggestions since they "would add complexity and make the clauses more difficult for consumers to understand."[36]

We acknowledge that the language would introduce new terms but they introduce a series of benefits that would far outweigh these concerns. The benefits include:

[36] Page 21 of the ICA Application

- standardising the application of observability
- addressing Recommendation 3 of the Parliamentary Inquiry
- addressing key terms unaddressed by the Proposed Conduct i.e. pre-existing damage and defect and
- reducing overall confusion, issues with comparability and better clarifying what is expected of consumers.

Again, any complexity can and should be explained in Plain English in accompanying education materials.

- **Confine the wear and tear to that which occurs the period of insurance**

The definition of maintenance should include wording to the effect that:

> *You must take reasonable steps to maintain your [home / insured property] throughout the period of insurance under this policy so that it is in the same, or substantially similar, state of repair* ***as it was at the commencement of the period of insurance under this policy.***

Similarly, the definition of "wear and tear" should include wording to the effect that:

> *We will not cover you for 'wear and tear', or for death, bodily injury to any person, liability, loss or damage directly caused by 'wear and tear'* ***which occurs during the period of insurance under this policy.***'

This drafting would shift the clause away from being a performance bond or an obligation to improve to one re-centred on maintaining the property from the commencement of the insured period. It enlivens the reality of an insurer taking the risk as they find it. It ensures that the wear and tear is limited to the period of cover - not existing wear and tear.

The insurer cannot have it both ways. Insurers does not typically conduct bespoke inspections of residential premises to be insured (presumably for cost containment reasons so as to ensure that the insurance offered is affordable) and rely entirely on disclosure by the insured. They then cannot complain about wear and tear that occurred before it came on risk which the insurer could have identified and excluded but elected not to.

Critically, this wording would appropriately shift the issues that arise from denials based on a "lack of maintenance" to the duty to not make a misrepresentation under

Section 20B of the *Insurance Contract Act* with its accompanying onus on insurers to ask specific questions to identify the risks they are willing to cover and not cover.

- **Remove the list of examples from both maintenance and wear and tear**

  As explained above, including a list of examples in the definition itself means that in practice insurers will treat the list as a checklist of reasons to exclude a claim.

  Again, the ICA have not incorporated these suggestions since they "would add complexity and make the clauses more difficult for consumers to understand."[37]

  We do not accept this view. The removal of this list would in fact reduce complexity and – when combined with an appropriate education campaign clearly explaining clear the types of maintenance that consumers should undertake – it would more appropriately assign the roles in addressing the issues identified to a standard definition and an education campaign.

- **Simplify the role of natural forces in maintenance and wear and tear**

  We recommend included in the definition of wear and tear a reference to "the passage of time". i.e.

  > *'Wear and tear' is the normal deterioration of your [home / insured property] or contents from ordinary, everyday use, or the passage of time, but does not include:*
  >
  > *(a) the effect(s) of any insured event otherwise covered by this policy; or…*

  At a general level, we agree that the ordinary, day-to-day effects of natural forces on homes and contents over time are not intended to be covered by insurance – the sun fading your blinds, the sea salt spray in the air causing rust, regular rainfall gradually washing soil away etc.

  However, we think these matters are covered by including a reference to the "passage of time". The common thread linking natural environment/weather-based wear and tear is the passage of time, and so that is what should be included to capture this concept in the definition.

  We are concerned that including a reference to "*ordinary effects of weather and the natural environment*" introduces ambiguity and confusion into the exclusion,

[37] Page 21 of the ICA Application

particularly given many of the events covered as insured events in the policy are weather events (storm, flood etc). Including weather as something consumers are both covered for and not covered for is confusing and risks unintended consequences. It will lead to disputes about what "*ordinary effects of weather and the natural environment*" means in the context of the exclusion and the policy as a whole.

Further, we believe attempting to define "natural environment" and "weather" in this part of the policy risks inconsistency with the definitions of weather-based insured events.

Plainly, both the maintenance and wear and tear definitions should be conditioned on unexceptional day to day weather with maintenance issue and as opposed to maintenance issues and wear and tear created by extraordinary weather events such as natural disasters which should remain covered or, if excluded, this is done so in a manner which has been clearly stated and agreed to by the insured and not by way of a definition. This needs to be made clear in the proposed definitions or by some other mechanism.

To this end, we recommend excluding from the definition of wear and tear "the effects of insured events otherwise covered by this policy." Given these will likely be subject to a process of definitional standardisation via the as yet un-finalised Treasury process, we think it preferable not to pre-empt that process by attempting to articulate the difference between an insured event and natural forces such as weather here.

We anticipate that process will allow for more extensive consultation by a broader range of stakeholders and experts in relation to each defined events.

- **Exclude Failure of Utilities from the definition of wear and tear**

Latent defects are by definition not wear and tear. Similarly, impacts arising from the failure of utilities - an external force not within the consumer's control – cannot and should not be considered wear and tear. We therefore recommend including the following definition:

> *Failure of Utilities means any failure in the regular and ordinary supply and provision of electricity (including temporary loss of power, blackouts of any kind or power surges), gas, telecommunications, water, sewerage or stormwater services (including burst pipes or blockages) to your [home/insured property]*

The definition of Failure of Utilities covers known utilities but may need to consider others not listed or capture new or developing utilities and should apply to both definitions.

The definition of Latent Defects is in line with that proposal for maintenance and seeks to address the issues identified in the Flood Inquiry that there are problems with homes and property that are not readily apparent to consumers or that consumers cannot literally see or know.

We again note that the ICA have not incorporated this suggestion since they "would add complexity and make the clauses more difficult for consumers to understand."[38]

Again, we believe the benefits to consumers outweigh the detriments since the concept clarifies a key element of the bundle of terms of exclusion relating to maintenance and wear and tear, and the issues that arise.

Require assurance that all general insurers in the home building insurance market will include the amended Standard Definition

A standard definition is in no way useful unless all insurers use it. It is however not entirely clear whether this Application can achieve this outcome. What can guarantee this is that standard term is legislated in much the same wat as the standard term for "flood" is under Regulation 34 of the *Insurance Contracts Regulations 2017*.

If the Condition is not accepted, then the Application to Authorise the Proposed Conduct should be denied

If the ACCC agree with the conditions outlined above, but the ICA do not agree to those same conditions, then the ACCC must deny the Application.

[38] Page 21 of the ICA Application

Appendix A - Consumer group counter proposal for Maintenance and Wear and Tear

Maintenance Condition – Consumer group proposal

You must take reasonable steps to maintain your [home / insured property]

We will not cover you for death, bodily injury to any person, liability, loss or damage directly caused by your failure to maintain your [home / insured property] in accordance with this clause.

This clause is a condition to which section 54 of the *Insurance Contracts Act 1984 (Cth)* applies but it is not a condition precedent to indemnity under this policy.

You must take reasonable steps to maintain your [home / insured property] throughout the period of insurance under this policy so that it is in the same, or substantially similar, state of repair as it was at the commencement of the period of insurance under this policy but where the state of repair as determined under this clause is subject to, and makes allowance for, any wear and tear (as defined below) up to the occurrence of any indemnifiable event the subject of this clause.

The obligation on you under this policy to repair and maintain your [home / insured property] throughout the period of insurance so that it is in the same, or substantially similar, state of repair as it was at the commencement of the period of insurance under this policy is limited only to repair and maintenance (excluding Latent Defects):

a) of items or issues of repair and maintenance that first occurred during the period of insurance under this policy; and
b) of items and issues of repair and maintenance which you actually became aware of during the period of insurance under this policy; or
c) of items and issues that could reasonably have been identified or discovered by you in the ordinary course during the period of insurance under this policy where such identification and discovery does not include obtaining expert advice or opinion nor conducting extensive, intrusive or destructive investigations or inspections of your [home/insured property].

Notwithstanding anything else contained in this clause, this clause does not apply to any Latent Defect which exists in your [home / insured property] at the commencement of the period of insurance under this policy and the cover under this policy includes the repair,

reinstatement and rectification of any Latent Defect (or part thereof) provided such Latent Defect (or part thereof):

a) is within that part of your [home / insured property] which suffers loss or damage and is otherwise covered under this policy; or,
b) if a Latent Defect (or part thereof) does not form part of the loss or damage referred to in sub-paragraph (a), the repair, reinstatement and rectification of any Latent Defect (or part thereof) is reasonable or necessary as part of the repair, reinstatement and rectification of the loss or damage referred to in sub-paragraph (a).

Wear And Tear Clause – Consumer group proposal

We will not cover you for loss or damage directly caused by wear and tear

We will not cover you for 'wear and tear', or for death, bodily injury to any person, liability, loss or damage directly caused by 'wear and tear' which occurs during the period of insurance under this policy. 'Wear and tear' is the normal deterioration of your [home / insured property] or contents from ordinary, everyday use, or the passage of time, but does not include:

(a) the effect(s) of any insured event otherwise covered by this policy; or
(b) the effect(s) of any Latent Defect(s); or
(c) the effect(s) of any Failure of Utilities to your [home/insured property].

Failure of Utilities means any failure in the regular and ordinary supply and provision of electricity (including temporary loss of power, blackouts of any kind or power surges), gas, telecommunications, water, sewerage or stormwater services (including burst pipes or blockages) to your [home/insured property]

Latent Defect means any defect, error or omission in the design, construction, commissioning and/or installation of your [home/insured property] which existed at the commencement of the period of insurance under this policy where such defect, error or omission:

(a) meant that the design, construction, commissioning and/or installation of your [home/insured property] was not, from the commencement of the period of insurance under the Policy, fit for purpose (in whole or part) and in accordance with any applicable Legislative Requirements (in whole or part); and
(b) could not have reasonably been identified or discovered by you in the ordinary course where such identification and discovery does not include obtaining expert

advice or opinion nor conducting extensive, intrusive or destructive investigations or inspections of your [home/insured property].

Legislative Requirements means all Commonwealth, State and Territory legislation which applies to, or regulates, the design, construction, commissioning and/or installation of residential or domestic dwellings or premises including, without limitation, the Building Code of Australia and the National Construction Code.