The History of Flood Insurance in Australia

Historical records show that since the 1800's, European settlement in Australia has been adversely affected by severe natural disasters. As early as 1819, Governor Lachlan Macquarie issued a general order for settlers to avoid developing in areas that were known to be flood prone. His general order of Wednesday 15th March 1819 reads;

> *"When the too fatal consequences of years has shown the Sufferers the inevitable consequences of their wilful and wayward habit of placing their Residences and Stock Yards within the reach of floods and whilst it must be still in their Remembrance, that many of the deplorable losses would have been in great Measure arrested had the Settlers paid due consideration of their own interests, and to the frequent Admonitions to remain within the flood marks of the townships assigned to them on the high lands.*
>
> *Those, who notwithstanding shall perversely neglect the present admonition and Exhortation to their own Benefit, must be considered wilfully and obstinately blind to their own interests and undeserving any future Indulgences." - (Macquarie 1819)*

Introduction

The absence of universally available and affordable flood insurance has been the norm since property insurance became available in the earliest times of European Settlement. Governments at all levels , the insurance industry and individual insurers have reviewed the situation after almost every major flooding event, and have made several attempts to find solutions which would be acceptable to the community and to the insurers, who undertake the risk, alike.

In most recent years individual insurers have taken the initiative to provide insurance on a commercially viable basis and the Insurance Council of Australia (ICA) has reported that approx. 54 per cent of policies now include cover for Flood. However, competition has meant that the approach varies greatly from provider to provider and also geographically from State to State because of the great variation in risk profiles. 94 per cent of the residential properties at risk of flood greater than 1 in 100 years are located on the East coast of Australia. Queensland has the highest number, with 36 per cent. A number of insurers continue to exclude the risk completely for commercial reasons.

International Comparisons

Australia is not unique in this regard. There are few countries who have successfully addressed the consumer need and almost none of those through a completely private sector solution. The United Kingdom is the closest to a private sector solution, but depends on the Government minimising flood risk through mitigation and land use planning. In many countries there is neither insurance nor State compensation for citizens (e.g. Germany, Israel). Others have State led insurance schemes (e.g. France, Spain) while others provide State compensation in hardship cases, notably Australia.

The UK experience

The UK has often been pointed to a as model for Australia. However on close examination, there are a number of factors which have made the UK approach viable, although it is understood to currently be under threat of withdrawal from some insurers.

The genesis of the current model is that industry was put under pressure by government, including with threats of nationalisation, to provide cover for flood. Insurers agreed to provide cover at affordable premiums (implicitly through cross-subsidies), whilst the Government committed to flood mapping the entire UK and to committing funds to mitigation, flood prevention and remediation on an ongoing basis. The building of the Thames barrier is probably the most public manifestation of preventative action.

It is reported that increasing frequency and costs of disasters , in part attributed to climate change, and reduced funding for mitigation is causing the insurance industry to reconsider its position. A number of insurers have entered the UK market but have not signed up to the agreement, gaining a competitive advantage.

The Australian Insurance Market Origins

The original dominant participants in the insurance market in Australia were subsidiaries or branches of major UK insurers, whose contract terms, underwriting rules and even pricing were derived from their parent office in the UK. The earliest policies were Fire Insurance policies on home buildings. Successively, in response both to consumer demand and the emergence of new risks, policies were expanded to offer cover for additional perils for which additional premiums were charged e.g. Explosion, Impact by Aircraft, Earthquake, Riot and Civil Commotion, Storm and Tempest, Busting and Leaking of water apparatus.

Similarly, companies progressively excluded certain risks such as War, Nuclear Explosion, Contamination, Wear and Tear, Subsidence and Landslip, Tsunami; also in response to the emergence of new risks, experience or because the risks failed to meet insurers' "Criteria for Insurability" (see section X).

Flood as a peril was not withdrawn, rather it was never included, at least until the changes which took place post the passage of the Trade Practices Act 1974 and the Insurance Contracts Act in 1984. Until 1974 the insurance industry largely acted in concert. The predominantly UK based insurers were members of the Fire Accident and Marine Underwriters Association (FAMUA) who published "tariffs" for certain types of risk. These tariffs, which were commonplace in other countries and especially the UK, not only established industry premium rates but also policy terms and conditions. Companies who were not members were known as "non-tariff" companies and they usually competed by offering premium discounts from the tariff prices, but largely on the same wordings.

This situation is most aptly reflected in the advertisement placed in the Brisbane Courier Mail on 31 January 1974 by

- The Fire and Accident Underwriters Association of Queensland,
- The Non-Tariff Association Q'ld (sic) Branch, and
- The State Government Insurance Office Q'ld(sic)

in which the Insurance Commissioner said *"Unless building and contents policies carry a specific extension to include damage by flood, no flood cover exists".*

The Trade Practices Act 1974 (Cth) (now the Competition and Consumer Act 2010)

The tariffs ceased to exist with the passage of the Trade Practices Act 1974 (Commonwealth) and each insurer was obliged to undertake its own product development and pricing. Bundled cover started to emerge as did strong competition on price*. However, in relation to the absence of flood insurance there was little change. This was partially because of industry concerns about the magnitude of exposures based on research and technical work done by committees of the Insurance Council of Australia (ICA), the successor to FAMUA . For example, in 1990 using the ANUFLOOD application it was estimated that 11,594 urban residential properties and 3,034 commercial properties in Sydney would suffer structural failure in a PMF (probable maximum flood). At the time this was deemed to be beyond the financial capacity of the insurance market.

Additionally, there was and continued to be concern about the insurability of the risks themselves, given a lack of consistent and reliable flood maps, the absence of risk management/ mitigation and the ability of the affected or at risk community to afford the required premiums.

*The Insurance Council of Australia continued to promulgate advisory premium rates and model policy wordings until its interim authorisation from the Trade Practices Commission expired in September 1980. ICA annual reports continued to list its services as including “developing model policy wordings for member companies” until 1986.

Brisbane 1974 Floods

Following an exceptionally wet spring and cyclone Wanda, the Brisbane, Bremer and Stanley River catchments produced widespread and severe flooding throughout south-east Queensland in late January, 1974.

The event was the first major flooding event occurring in an Australian capital city during the 20th Century. Brisbane had suffered from 6 flood events of equal or greater magnitude to the 1974 floods between 1800 to 1900. Most notably, a major flood occurred in 1893 which is still the highest recorded flood in Brisbane.

Local planning laws had been based on a minor flood which occurred in 1931, and building was restricted to above that flood’s level.

Interestingly, some news articles following the 1974 floods suggested that Brisbane residents had a misplaced confidence in the Somerset Dam’s ability to mitigate flooding. It had been built following the 1931 flood.

> *“There was some misplaced confidence since the building of the Somerset dam on the Stanley River. The Wivenhoe dam, due to be completed in 10 years will stop a flood of the 1893 proportions hitting Brisbane. But 20ft floods like this one [1974] will still be possible” - Arch Shields, Bureau of Meteorology, 1974*

This was arguably the first flood event which caused a public backlash against insurers as the overwhelming majority of insurance contracts did not include flood, in contrast with the present day

where flood cover is included in the standard cover set out by the *Insurance Contracts Act(1984) Cwth.*,

Following community backlash against insurers there were calls for the creation of a natural disaster fund and similarly to today, comparisons with New Zealand's natural disaster scheme.

Proposal for Natural Disaster Insurance Scheme, 1974

In October 1974, a Committee made up of members of the Australian Insurance Association, overseas reinsurers, brokers and loss adjusters presented a report to the Government entitled *Feasibility Study into the Introduction of a Natural Disaster Insurance Scheme for Australia*. It suggested that a scheme be established for the provision of insurance cover against flooding and several other natural hazards. This was largely in response to insurers not including cover for damage from flooding in 'standard' insurance policies.

The committee recommended that a natural disaster insurance scheme should include the hazards of flood, earthquake and associated hazards (sea surge, subsidence or landslip, subterranean fire and volcanic eruption) for both domestic and commercial interests.

The basic structure of the scheme was;

- Funding through a compulsory levy on fire insurance policies
- Reinsurance on the overseas market and with insurance companies in Australia
- Insurance companies would act as agents in the collection of the levy and payment of claims
- The government to act as lender of last resort in the event of extreme events

The Committee later recommended that tropical cyclones also be included in the proposed scheme. It was suggested that an additional levy be charged in high-risk areas (eg. Northern Queensland).

Commonwealth gives in-principle support to a Natural Disaster Insurance Scheme, 1976[1]

In March, 1976 the Fraser Government announced that it agreed, in principle, to introduce a natural disaster insurance scheme and established a working party of officials to formulate a scheme in consultation with the insurance industry and States.

The working party reported in December, 1976. It recommended that insurers form a pool to offer natural disaster cover for households and small business. The Commonwealth would offer the pool reinsurance for catastrophic risks up to a defined limit to private insurers and cover earthquake, flood, tropical cyclones, landslide and storm surge. A premiums committee would determine the applicable rates for cover, which insurers would be required to charge policyholders.

[1]Source Howard, J. 'Natural Disaster Insurance: A Policy Information Paper issued by the Treasurer' 1979

There was consultation on the paper. While it was widely acknowledged that improvements in the means of handling the financial effects of major disasters on households and other aspects of natural disasters were desirable, there were a number of problems with the model proposed:

- Insurers argued that the scheme would reduce the reinsurance capacity available to the industry as a whole. It was argued that individually, insurance companies could obtain more cover than if an approach were made on a collective basis.
- It was noted that non-participating insurers would have a competitive advantage in low-risk areas.
- There were 'philosophical' points raised concerning the appropriateness and desirability of detailed intervention by government in the provision of insurance
- The industry was strongly supportive of such a scheme following the 1974 disasters. However, in the period 1976-1979 this strong commitment waned and a greater divergence of views within the industry emerged. This was due to
    - there being no further disasters
    - the financial health of the insurance industry improving markedly
    - consumer backlash against lack of coverage for flood subsiding
    - higher premiums as a result of higher reinsurance costs becoming accepted by the community.

Rejection of the 1976 recommendations, 1979

The scheme proposed in 1976 was rejected by the new Treasurer, John Howard (who replaced Phillip Lynch in 1977) in 1979. He suggested that:

> "… the scheme would be inappropriate on budgetary, technical and insurance grounds…" arguing that the provision of reinsurance cover by the Government would not solve the underlying problems, it would merely shift them from the commercial to political arena
>
> "… such a scheme would be inconsistent with a basic tenet in [the government's] political philosophy – namely that governments and government authorities should, to the maximum extent possible, seek to avoid intervention in matters that can be left to the private sector."
>
> "...the Government had concluded that a number of practical measures, dealing more directly with the problems that had been identified and involving less government intervention, would be more appropriate".

The Insurance Contracts Act 1984 (Cth) and Flood definitions

Australia became the first and probably remains the only OECD country to have developed comprehensive legislation which specifically governs insurance contracts. Importantly, the legislation includes Regulations which spell out the wordings for standard contracts for consumer products including home building and contents policies ('Standard Cover'). The home building and contents Standard Cover included cover for "flood" without any further definition of that term. Insurance

companies were permitted by the legislation to vary Standard Cover, provided that they clearly informed consumers of any variation (derogation).

A technical committee of the ICA produced a definition of flood which in 1984 became widely adopted in the insurance industry as an exclusion. The definition was:

"the *inundation of normally dry land by water escaping from the normal confines of any natural watercourse or lake whether or not altered or modified, or any reservoir, canal or dam."*

This exclusion became the base from which changes were made by companies to grant partial or fuller "flood" cover, or which they further refined to make the exclusion more watertight. As more events occurred and greater interpretations were applied to what was included as Storm and excluded as Flood the ICA issued further advisory wordings , including a "plain language" version prepared by Professor Robert Eagleson in 1999. However, in the absence of an authorisation under the Trade Practices Act (1974) these were not generally adopted and each insurer developed its own definition.

The controversy resulting from the Hunter and Central Coast floods in 2007 is reported to have led the insurance industry to again propose a standard definition for flood in 2008.[2] Heavy storms and rain in the Hunter and Central Coast regions during early June, 2007 caused extensive flooding over a 36 hour period. 10 people were killed, 105,000 homes were without power and insured losses of $1,170 million were recorded[3]. Many insurance claims were rejected on the basis that the cause of inundation was riverine flooding or sea surge. The ACCC acknowledged at the time that there were unsatisfactory levels of consumer confusion on insurance cover for flood and granted the ICA conditional authorisation for a proposed common definition.

The ICA proposed a definition in the following form:

> *"inland flood is the covering of land that is not normally underwater by:*
>
> : *water that overflows or escapes from a naturally occurring or man made inland watercourse (such as a river, creek, canal or storm water channel) or water pool (such as a lake, pond or dam), whether it is in its original state or it has been modified; or*
>
> : *water released from a dam whether it be accidentally released or intentionally released to control, mitigate, regulate, or otherwise respond to excess water; or*
>
> : *water that cannot drain or run off as a result of water that is overflowing or escaping from an inland watercourse or water pool preventing the escape of water"*

The ACCC later rejected the proposed definition and stated that the form proposed by the ICA would be unlikely to lessen consumer confusion. In its press release, the ACCC said the proposed definition had raised 'too many uncertainties' and that it was particularly concerned 'that the ICA definition of flood introduced a range of new concepts the legal implications of which are not clearly understood'. Consumer groups argued that the definition would increase, rather than decrease consumer confusion. The ICA then stated it would undertake no further work on the standard definition. The

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[2] http://afr.com/p/national/easy_definition_of_flood_is_yet_H07VEJWagzfoGrE8WNc5dL

[3] http://www.swissre.com/rethinking/natcat/Flooding_in_Australia_The_reality_of_a_secondary_peril.html

greatest problem faced by consumers is understanding the boundary between flood and storm. Even where insurers include flood there is a new boundary between flood and actions of the sea, storm surge, tsunami and similar excluded perils

External Dispute Resolution[4]

In response to growing consumer needs and activism , the Insurance Council of Australia and its member insurers voluntarily established the industry's first external dispute resolution mechanism; which was independent of insurers, free to consumers, with the power to make binding determination on claims. One of the first events giving rise to a series of disputes to come before the panel was the Benalla floods of 1993.

Until the advent of the Claims Review Panel very few insurer decisions on flood had been tested through the courts. The panel set about a very careful assessment of claims, including calling for independent expert advice, (mainly hydrological), applied the Insurance Contracts Act (1984), and also considered carefully legal concepts including the doctrine of proximate cause. The panel made determinations on the Benalla and later the 1998 Townsville[5] floods which surprised some insurers, but which created new ground for definition of flood and for the adequacy of disclosure by insurers. This coupled with the introduction of the General Insurance Code of Practice in 1994, led to a significant improvement in policy wordings including disclosure and the use of plain language, but did not of itself cause any expansion in the availability of flood insurance. However, it did bring more losses within the scope of the definitions of storm.

Arguably, rather than improving consumer understanding, this led to more consumer confusion and greater perceptions of inequity in dealing with claims, when some claims arising from a single event (in the public's eye) were treated as flood and others as storm damage.

Advice and the Corporations Act 2001

In its early years, insurance in Australia was distributed through agents, whether staff, independent or tied agencies or corporate agencies. While agents were representatives of the insurer there was often direct or personal contact between the consumer and the company's representative and advice was generally provided, including at times of claims.

From the 1970's, commencing with car insurance, direct selling developed rapidly in Australia. The pioneers were the motoring organisations, State Government insurers and an industry joint venture Club Motor insurance which became AAMI. Telephone and subsequently the internet reinforced this trend to the point that direct selling/purchasing is now the norm, and there is little personal contact and much less provision of advice.

The changes to the Corporations Act 2001 reinforced this trend by imposing significant compliance, training and disclosure obligations on the provision of advice. Many Insurers' response was to take

[4] Firstly the Claims Review Panel (1991), subsequently Insurance Enquiries and Complaints, Insurance Ombudsman Service and now the Financial Ombudsman Service

[5] The Panel concluded that stormwater ponded behind the houses in Townsville on its way to a natural watercourse being the two rivers and had therefore not risen from a watercourse in the context of the exclusion wording. The panel reached similar views with regard to Wollongong, Coffs Harbour and Katherine in that there was stormwater damage preceding any actual flood damage. As a consequence of the Panel's determinations, Insurers changed their attitude and introduced cover for flash flooding from storms but with some limitations as to the time frame and geographic area from which claims would be accepted. For a more detailed discussion refer to The General Insurance Enquiries and Complaints Scheme: The First Ten Years Joe Isaac pp52 et seq.

formal steps to ensure that they and their authorised representatives did not provide advice at all, only “information”.

Changes to the Corporations Act in 2001 introduced even greater obligations on insurers for disclosure, including requirements for Statements of Advice (SOA’s) and Product Disclosure Statements (PDS’). Insurers extensively revised documentation and some went to great lengths to highlight key exclusions such as flood. Unfortunately, subsequent flood events, such as the 2010/2011 flood season, have served to demonstrate that few consumers read, understand or retain the information contained in these documents.

Domestic insurance is a commodity style product and low cost per transaction is essential in order to maintain an affordable and competitive premium. It is unlikely therefore that widespread provision of advice will re-emerge.

Public Pressure

A succession of flood events in the 1980’s and 1990’s, coupled with public, media and political pressure saw repeated efforts to design a solution. The insurance industry, through ICA made extensive efforts to address the problem. [6] There was significant engagement with a wide range of other interests who came together to design a solution. For example, a workshop was held at the Australian National University in 2001 between numerous and varied stakeholders whose findings were subsequently published[7]

These initiatives came close to providing a complete solution with different models in:

- 1989/1990, which inter alia proposed the inclusion of flood in every household insurance policy, a standard premium levy, community rated, irrespective of flood exposure or not, and a reinsurance pool;
- 1998/2000, which included a proposal that government take responsibility for the “uninsurable” risks i.e. those with a 1:20 return period or worse;
- 2004/2006, when ICA also conducted international research to consider approaches in other countries. At the time, the USA FEMA approach looked most attractive, but that was before Hurricane Katrina.

Each of the industry’s previous attempts to resolve the problem collectively was unsuccessful because of one or more of the factors of competition, lack of adequate flood maps, lack of government support, affordability, and Trade Practices Act barriers.

The current ICA initiatives, which are ongoing, have importantly produced the National Flood information Database and have facilitated a widening of the availability of insurance.

[6] Annual Reports of The Insurance Council of Australia from 1979/80 to 2010”
[7] Water Research Foundation of Australia “Residential Flood Insurance the implications for floodplain management policy ANU 2001”

Meanwhile, each significant flood event continued to cause public backlashes against insurers, most notably in 2007 with the Hunter region flooding (see previous section) and after the 1998 Woollongong floods, where community and media pressure, including rallies outside the headquarters of NRMA and QBE and one insurance company CEO's house, and statements by the Prime Minister and Governor-General put pressure on the industry to pay claims arising from the floods[8]. The NRMA and the GIO both paid claims "ex gratia" but most others maintained their position.

Mapping

Until very recently, the lack of availability of flood maps has been the single biggest obstacle to insurers' ability to underwrite flood risk. Flood mapping probably reached its nadir when in 1984 the NSW government suppressed its flood maps, which were to a 1:100 floodplain definition and also deleted the 1:20 floodway standard. The primary concerns were possible voter backlash following a political fear campaign about property values and local government concerns over potential liability for planning decisions.

In 2000 ICA conducted a national survey of local government which found inter alia that:

- Relatively few had historical information on flooding in their municipality and even less used the information in their planning
- Councils in each State used different methods
- 42% of Councils did not incorporate local flood information into their planning schemes

The problems were not universal. For example, at the time, Melbourne Water had excellent flood and drainage maps of the Metropolitan area. Flood mapping in Adelaide was sophisticated. There was good mapping in Katherine, but it had underestimated the Probable Maximum Flood. Individual insurers commenced geo mapping of the coastal regions of Australia themselves and applied the information to their new underwriting initiatives.

The ICA released the first version of the National Flood Information Database in December 2008, which at that time detailed 30 per cent of Australia. The project was funded by the ICA through its members, with the intention of encouraging more insurers to offer flood cover. It was the first time that a national source of flood-risk data had been created.

Disaster Response

The ICA established the National Insurance Emergency Services in 1979(IES). This arrangement co-ordinated all members response to declared natural disasters, including the appointment of loss adjusters, the allocation of claims and establishing standard fees. By 1990, larger insurers and larger adjusting firms took control over their own disaster response, and the practice fell into disuse .The General Insurance Code of Practice in 1994 and its 2000 revision had a major impact on improving standards for claims management and disaster response. The IES was finally terminated in 1999 and

replaced by the Insurance Disaster Response Organisation (subsequently revised to CCA-Catastrophe Coordination Arrangements) whose role was one of co-ordination and communication with all stakeholders, especially government agencies involved in natural disasters.

The market has increased cover over time

The unavailability of flood insurance has largely been a problem for the Eastern States of Australia, reflecting the risk of frequent and widespread flooding arising from the topography and the river systems in Queensland, New South Wales and to a lesser extent Victoria.

Post the Townsville Flood in 1998 insurers amended policy wordings to deal with the concept of ponding or pooling following decisions made by the Insurance Ombudsman, who determined that low lying land filling up with water did not fall under the common exclusions at the time. This same phenomenon was argued in the 2001 Supreme Court case Hams v CGU Insurance Ltd [2002] NSWSC 273. However this decision rested on the interpretation of s35 of the Insurance Contracts Act (1984) and the duty to clearly inform.

After the Wollongong floods in 1998 several insurers moved to extend their policies to include "flash flooding", while others provided partial cover with lower limits and some restricted cover to water damage occurring within fixed time frames after an event. Westpac introduced automatic flood cover across all home insurance products, and extended this to St George, Bank SA and RAMs policies when those businesses were acquired. Other companies remained firm in their exclusion of all flood cover.

ASIC undertook a national review of consumer problems with flood cover in June 2000. Information collected from councils, insurers, consumers, and Insurance Enquiries and Complaints Ltd. in relation to flood included sales processes,, policy documentation, disclosure, and claims handling. ASIC's key recommendations were focused on improving consumer information both in relation to insurance coverage and importantly to regional flood information (mapping).

Flood cover has long been available as a standard offering in West Australia and South Australia and the Territory Insurance Office (TIO) has automatically included flood insurance in its household insurance policies in the Northern Territory. The TIO coverage exacerbated community concerns after the Katherine Floods in 1998, when people insured by companies other than TIO found they were not insured, while their neighbours were.

Suncorp originally offered flood insurance on an offer and acceptance basis and has included it as standard for all it's brands except AAMI since 2008. RACQ also offers flood on an offer and acceptance basis, although it is understood that take up is minimal.

Suncorp who introduced flood cover as standard on 1 July, 2008 reportedly spent several years on developing its pricing and collating flood map data of which it held a considerable amount, given it used to map all properties which it covered during it's time as a Queensland government department. The reputational risk for Suncorp, given Queensland's susceptibility to flooding and

Suncorp's 40 per cent market share in that state, was deemed to be too great for Suncorp not to offer flood.[9] [10]

Zurich insurance introduced flood cover as standard in September 2008.

NRMA Insurance offered flood cover with opt-out in New South Wales, Tasmania and the ACT from June 2009.

Progress continues to be made by individual companies, but as demonstrated by the events of 2011, there is no community- wide standard approach. It is arguable that the situation was clearer in the days when there was no flood insurance at all and there was at least a general understanding in the community and amongst politicians, regulators and the media. That is not to say it was satisfactory from the consumer point of view, nor from the perspective of insurance companies whose customers are most affected.

It also needs always to be borne in mind that insurance is not a "solution" to flood. It is merely a mechanism to transfer the costs. Insurance does not reduce the risk or improve the safety of the community and its property. The ultimate solution rests in the hands of those responsible for floodplain management policy.

A.J.Mason

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