



SUBMISSION FROM: Geoff Baker (a private citizen), [REDACTED]
14 February, 2011

TO: The Chairman,
OF: The Queensland Floods Commission of Inquiry, GPO Box 1738, BRISBANE, 4001

Sir,

In response to the call for submissions published in the press, I have two topics upon which I wish to make submissions to the Inquiry. They are:

1. Private insurers and their responsibilities, and
2. Land use planning.

1. Private insurers and their responsibilities

I have an insurance policy with Apia in which my house and contents are covered for the risk of flood. However, a policy exclusion is listed as "*Tidal inundation caused by the action of the sea, erosion, landslide, subsidence or tsunami.*"

I emailed Apia with the following queries in an attempt to clarify these exclusions. The queries I addressed to Apia were as follows:

QUESTION 1 Cyclones are caused by the action of the sea, that is the location where they form, from where they come ashore and then dissipate. So, if a flood invades my house and the rainfall which caused that flood was due to a cyclone, are you going to deny responsibility?

QUESTION 2 If the answer to question one is 'Yes', what is the definition of a cyclone - by barometric pressure at its centre when crossing the coast or some other criterion, for example how far away it crossed the coast?

QUESTION 3 If the answer to question 1 is 'No' and that damage due to floods caused by cyclone-generated fresh rain water is at the risk of Apia, what is the situation in the following hypothetical circumstance:

A cyclone occurs, it crosses the coast and causes a huge amount of rainfall and floods - naturally all fresh water. But then, half hour after the flood reached an area near or in my house, there is a tidal surge. The front part of my house is affected by a mixture of sea and fresh (albeit muddy) water and the back part by fresh rainwater only.

QUESTION 3a. Do I or your assessor have to go round my house tasting the flood damaged articles to check for evidence of salt water? If the answer is 'No', how do you determine the extent of tidal-surge water as opposed to pure rainwater?

QUESTION 3b. What is the limit of sea water invasion for me to claim that the damage was caused by a fresh rainwater flood - 5% salt with 95% fresh water or some other balance?

QUESTION 3c. As assessors are unlikely to arrive within 24 hours of a tidal surge occurrence caused by a cyclone, the heavier salt water is bound to have sunk to the bottom of any flood water remaining in my house by the time of their arrival. Will the assessors test the top fresh water layer only or insist on testing the bottom layer - assuming it has not drained away?

QUESTION 3d. Would it be prudent for me after a flood, where sea water may have been intruded into a fresh water inundation, to hose down the damaged walls and furniture to rid them of traces of salt or would that be counted as fraud?

The questions 3a to 3d were meant to highlight the ridiculous exclusion in the practical and realistic circumstances of tidal inundation of houses in possible storm surge areas following heavy rainfall falling in advance of a cyclone-induced so-called 'tidal' surge.

It may be comforting to know that, where ambiguous clauses in a contract are those drafted by one party, they are subject to the '*contra preferendum*' rule. However, to challenge an insurer in court where one party to a claim has far larger resources to fund barristers to argue a case than the applicant, the '*contra preferendum*' rule may give little practical benefit or comfort to Mr & Mrs Average citizen.

The reply that I received from Apia was this:

Thank you for your below email. I am however, unable to answer all your below queries.

I can tell you that unlike a lot of insurance companies, APIA does offer full flood cover under our home insurance policies. We define flood as the inundation of normally dry land by water overflowing from the natural confines of any natural or artificial watercourse or lake. APIA home policies also cover for storm and rainwater damage. Hence, should an event such as is affecting many places in Queensland at the moment impact upon your property, you have cover under your APIA policy.

Flood cover excludes damage to retaining walls, paths, driveways, tennis court surfaces and paved or concrete outdoor surfaces, but fully covers your home and contents. Tidal inundation caused by the action of the sea, erosion, landslide, subsidence or tsunami are also excluded. (*APIA's misspelling, not mine*) Please refer to your APIA Home Advantage product disclosure statement for full details of cover and exclusions. If this event was to occur each claim would be assessed and reviewed on a case by case basis.

As can be seen from this reply, the respondent to my queries in Apia was "*unable to answer*" my queries. The only response was to repeat all of the already ambiguous terminology. The definition of flood was also restricted to its source – "a natural or artificial watercourse or lake". Mere heavy rainfall over flat and already saturated land causing a general rise in water levels, from say flash flooding from hard surface run-off, would apparently count as an exclusion from liability!

Suggestion to eliminate ambiguity in insurance contracts

In respect of the widely differing definitions of flood used in the insurance industry, it is submitted that the meaning should be enshrined in Law to apply to all policies purporting to insure against flood. The word 'Flood' should be defined legally and simply in the same or nearly the same terms as to be found in any good quality dictionary of the English language. A suggestion is:

FLOOD = An overflow or irruption of water inundating land not usually submerged.

No other meanings should be allowed to apply and any attempt to modify or apply a different meaning should be declared void. The word 'water' then covers all types of water – river, sea, rain, burst pipes, overflowing dams or tanks etc. As long as it contains H₂O then it is water and if it inundates land or things which are normally dry it is a flood.

The only exclusions which should be allowed is not to derogate from that definition but only to exclude the insurance cover from any valuable item of contents (say over \$5000 each) which have not been separately declared and specifically included in the policy.

2. Land use planning

Professional responsibilities

It is pertinent here to point out the large differences between some professions in respect of professional codes of ethics and legal liability.

For example, the Engineers of Australia publish their code of ethics on the web and it is unambiguous. An extract is reproduced below.

As engineering practitioners, we use our knowledge and skills for the benefit of the community to create engineering solutions for a sustainable future. In doing so, we strive to serve the community ahead of other personal or sectional interests.

Our *Code of Ethics* defines the values and principles that shape the decisions we make in engineering practice. The related Guidelines on Professional Conduct provide a framework for members of Engineers Australia to use when exercising their judgment in the practice of engineering.

As members of Engineers Australia, we commit to practise in accordance with the *Code of Ethics* and accept that we will be held accountable for our conduct under Engineers Australia's disciplinary regulations.

In the course of engineering practice we will:

1. Demonstrate integrity

1.1 Act on the basis of a well-informed conscience

1.2 Be honest and trustworthy

1.3 Respect the dignity of all persons

2. Practise competently

2.1 Maintain and develop knowledge and skills

2.2 Represent areas of competence objectively

2.3 Act on the basis of adequate knowledge

3. Exercise leadership

3.1 Uphold the reputation and trustworthiness of the practice of engineering

3.2 Support and encourage diversity

3.3 Communicate honestly and effectively, taking into account the reliance of others on engineering expertise

4. Promote sustainability

4.1 Engage responsibly with the community and other stakeholders

4.2 Practise engineering to foster the health, safety and wellbeing of the community and the environment

4.3 Balance the needs of the present with the needs of future generations

The clauses 2.3 and 4.3 are particularly relevant in today's circumstances.

In addition, civil and structural engineers are legally responsible for their design failures. For example, where a bridge collapses under the weight of its designated load, the legal precept '*res ipso facto*' applies; the engineer who designed and/or supervised the construction is liable at Law for his negligence.

Yet in the case of planners, not only do they apparently disregard ethical rules applying to professional engineers, but the Law, 'in its wisdom', holds the taxpayers, not the planners, liable for the costs of damage due to planning failures. Where are the so-called blind scales of justice in operation here? One profession culpable but not another! Why?

It is not enough to say (as has been said) that we do not have enough knowledge to plan to avoid the flood disasters we have seen recently in Queensland. John Oxley wrote in 1820 how he had observed that the Brisbane river had, at some time in the past, been a full 50 feet (= 15.2 metres) above its 'normal' height. Then there is the other evidence available to any layman with eyes to see: the series of markings on the side wall of the old Bond Store in Maryborough showing the heights of previous floods including the 1893 flood.

In view of this and other easily obtainable historical records, how could any planner be so stupid as to believe that:

- * the rainfall causing the flood heights in 1820, 1893, 1974 etc would never occur again; or
- * that such rainfall events occurred only once in a thousand years and thus could be ignored in practical planning; and
- * that the Brisbane and the Mary rivers were the only rivers subject to extreme rainfall events;
- * and, that competently managed, the Wivenhoe dam gates would prevent a recurrence of past flooding even in the event of the repetition of previously known rainfall events **and even though those gates had no control over the water from the Bremer River and Lockyer Creek ?**

Yet, as we have seen, the planners were either so ignorant, stupid or negligent as to believe, or act as though they believed all of these things.

It has often been said that local planning authorities are reluctant to reject planning applications for residential development in locations vulnerable to flood because either:

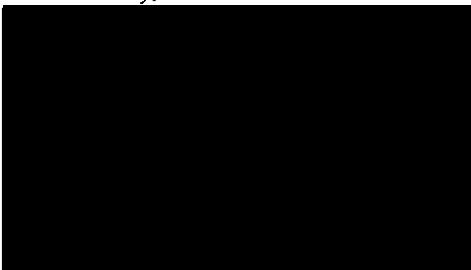
1. by doing so, such local authorities are rejecting a golden opportunity to create more employment in their areas; or
2. if they reject a residential development on the grounds that it is to be located in flood-prone land, the Land and Environment Court will overrule the rejection on the grounds that every landholder has a "right to develop" and that challenging such rulings involves costs so large as to ruin the budgets of the local authorities concerned.

In other words it is said that:

- * in case 1, we have to continue to build houses *ad infinitum* and wherever they are for the sake of jobs (ignoring the inconvenient fact that whoever fills up those houses will need jobs too), and
- * in case 2, human lives are of less worth than the opportunity to sell land for housing at a profit that was previously low-lying, agricultural land unsuitable and even dangerous for lives and property.

Do judges on the bench of the Land and Environmental Court get involved in rejecting engineering designs of bridges on the basis that they know more about engineering than qualified structural engineers? If it is true that the bench of the Land and Environmental Court is prone to overrule recommendations by qualified town planners, then I trust that the Commission's Report recommends that the members of the Land and Environmental bench be subject not only to a Code of Ethics similar to engineers but also be held responsible in Law for their actions. Immunity leads to irresponsibility.

Sincerely,



Geoffrey Baker