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The Honourable Desmond Derrington QC, consultant to the Australian & New Zealand Insurance Reporter considers the meaning of flood and relevant cases below.

In its ordinary meaning according to the Macquarie Dictionary and as typically used in insurance policies, that is, in its ordinary meaning and not modified by other considerations such as purpose or context or by the influence of a definition, “flood” means a great flowing or overflowing of water, especially over land not usually submerged; any great outpouring or stream; or to overflow in or cover with a flood, fill to overflowing. In this context, it is to be considered in relation to the alternative phenomena of run-off surface water or the entry of heavy rainwater. It should be noted, however, that this definition does not require that a flood should have a natural origin.

This dictionary meaning was applied in *Harper* v *Zurich Australian Insurance Ltd* (1987) 4 ANZ Insurance Cases ¶60-779, where a creek had overflowed after very heavy rain and the water and debris covered an area that was usually protected and dry, damaging a building on it. It was found to be a “flood”. It was also applied in *Hazanee Pty Ltd* v *Elders Ltd* [2005] NTSC 37 in respect of undoubted flooding by the Katherine River flood.

The ordinary basic distinction in common understanding, but the complexity of its application, also appeared in *Eastern Suburbs Leagues Club Ltd* v *Royal & Sun Alliance Insurance Australia Ltd* (2004) 13 ANZ Insurance Cases ¶61-599 where the cover was preserved if the primary direct cause of the loss was a non-excluded event, despite that the event was caused by excluded circumstances. Floodwater from a creek combined with ponded groundwater to cause the harm though the flood water did not force the groundwater alone to flood. The two forms were considered separately, but although the ponded groundwater would not alone have engaged the exclusion, the floodwater did so and because there was a concurrence of the causes of the loss, the excluded cause prevailed. The same circumstances led to the same result in *Prosser* v *AMP General Insurance Ltd* [2003] NTSC 80. It is not to the point that either cause could have caused the harm independently: *Caine* v *Lumley General Insurance Ltd* (2008) 15 ANZ Insurance Cases ¶61-756, but if other separate features of the harm had been caused by the groundwater without the influence of the floodwater, the loss in respect of those features would not have been excluded from the cover.

If surface water would naturally flow into a lake or creek but because of the overflow of that feature it is diverted and causes flooding, that inundation follows the escape of water from the lake or creek, and therefore may come within the definition of flooding despite an exception in respect of surface run-off: *Provincial Insurance Australia Pty Ltd* v *Consolidated Wood Products Pty Ltd* (1991) 25 NSWLR 541; (1991) 6 ANZ Insurance Cases ¶61-066 at 564; *K Sika Plastics Ltd* v *Cornhill Insurance Co Ltd* [1982] 2 NZLR 50.

In circumstances where a sudden downpour blocked drains and caused water to collect on the floor of the insured’s factory premises but it was shallow and remained for only a short time, this was held not to be a flood. However, cover of property in the building against damage “caused by rainwater”, where flood is not an issue, includes damage caused by evaporation of a pool of water gathered on a floor since the expression in its total context was ambiguous: *Manufacturers’ Mutual Insurance Ltd* v *Stargift Pty Ltd* (1985) 3 ANZ Insurance Cases ¶60-615.

If by reason of the inundation of normally dry land by water escaping from a watercourse, other water cannot flow into the watercourse and is forced into the insured’s premises, any damage sustained would be due to the escape caused by the flood. All the surplus water is overflow, whether it had been between the banks of the watercourse or not: *K Plastics Ltd v Cornhill Insurance Co Ltd* (supra at p 53); *Provincial Insurance Australia Pty Ltd v Consolidated Wood Products Pty Ltd* (supra).

The distinction between surface water and floodwater was of consequence in *Elilade Pty Ltd* v *Nonpareil Pty Ltd* (2002) 12 ANZ Insurance Cases ¶61-535, where heavy rain caused the entry of surface water into the insured’s premises, causing damage to stock directly or from the resulting humidity. Later, a nearby river

overflowed and the floodwater caused further damage. It was held that the flood exclusion did not apply to the earlier loss so that the total loss had to be apportioned.

Although it did not play a part in this decision, atmospheric dampness caused by a flood may be its proximate result: *Spika Trading Pty Ltd* v *Royal Insurance Australia Ltd* (1985) 3 ANZ Insurance Cases ¶60-663. Further damage to property reasonably consequential upon flood damage, such as damage by vehicles reasonably necessarily forced to cause it, will also be regarded as flood damage: *EK Nominees Pty Ltd* v *Indemnity Corporation Pty Ltd* (1990) 6 ANZ Insurance Cases ¶61-008. Problems may arise in respect of business interruption insurance of premises that were surrounded by floodwaters. If their cover merely referred to interruption caused by harm to the premises, there may be a reduced loss or none at all since in any case the flood of the surrounding area would have prevented any conduct of business for at least part of that time. This may be compensated for if there is also cover for prevention of access and loss of attraction extensions, but the rate of compensation may be different. See *Orient Express Hotels Ltd* v *Azzicurazioni Generali* (2010) EWHC (Comm — Hamblen J), a product of hurricane Katrina, which brought considerable flooding.

Aside from the influence of definitions or idiosyncratic construction influences, some factors that have been employed to determine whether water constituted a flood are:

- whether its source was natural
- whether its source was internal or external and its volume
- the manner of its arrival and whether it was an abnormal, violent or sudden event, and
- the area and character of the affected place.

See *Young* v *Sun Alliance & London Insurance Ltd* (1976) 2 Ll Rep 189; *Computer & Systems Engineering plc* v *John L Elliott (Ilford) Ltd* (1990) 54 BLR 1; *Wilson (MW) (Lace) Ltd* v *Eagle Star Insurance Co Ltd* (1993) SLT 938; *Rohan Investments Ltd* v *Cunningham* (1998) All ER (D) 5; *Trustees of Tate Gallery* v *Duffy Contractors plc* [2007] All ER (D) 197.

Dictionary definitions are not always a satisfactory substitute for a judicial construction of the word in the context of the policy as a whole and having regard to its purpose: *Hams* v *CGU Insurance Ltd* [2002] NSWSC 273; (2002) 12 ANZ Insurance Cases ¶61-525. The context, including what might engage the *ejusdem generis* rule, may limit the meaning of the expression. For this reason, an exclusion that referred to liability for damage caused by or arising out of "water from or action by the sea, tidal wave, high water and flood" was found not to refer to water that entered premises after heavy rain from a gathering point outside or from the inadequacy of the stormwater drainage system that propelled it into the premises: *Spika Trading Pty Ltd v Royal Insurance Australia Ltd* (supra). The combined features of the exclusion represented water residing in other than a wholly artificial setting or means of transportation. But for that context, it would have been accepted that the word referred to a great overflow or escape of water from a huge water tank or from a stormwater channel.

It may receive different interpretations in different parts of the same policy such as the expression of the insuring promise and an exclusion. In *Ashmore Aged Care Centres Pty Ltd* v *Cigna Insurance Australia Ltd* [1989] 1 Qd R 241; (1988) 5 ANZ Insurance Cases ¶60-860, the exclusion referred to "water or action of the sea, tidal wave high water and flood", which as a whole required a marine element.

The context will control its meaning by its juxtaposition with other expressions, such as "storm and tempest", either in the same or in other parts of the policy. In England it has been found that a cover for storm, tempest or flood imposed a limitation upon the meaning of flood so that it is present only if there is some element of violence, suddenness and abnormality to it and not merely a shallow covering of a significant part of the insured's land. It does not mean an overflow of water as from a sink, nor the result of seepage or trickling, but a phenomenon that has an element of largeness, violence and suddenness about it, constituting an irruption of water: *Young v Sun Alliance & London Insurance Ltd* (supra). Although the court there did not seem to have relied particularly on the accompanying features of storm and tempest, the limited meaning departs from the term's ordinary meaning and reflects the nature of its companions.

The contextual setting may differ with various types of insurance policies, but the limits of the meaning of flood in the context of an exclusion to a liability policy may well apply to a homeowner's policy: *Harper v Zurich Australian Insurance Ltd* (supra); *Spika Trading Pty Ltd v Royal Insurance Aust Ltd* (supra); *Manufacturers' Mutual Insurance Ltd v Stargift* (supra).

Whether a policy will cover damage by flood may depend on the terms of any definition of the term that it may ordain for that purpose. Aside from unconventional definitions, "flood" is typically defined as "the escape of water from the normal confines of any natural or artificial watercourse or lake, reservoir, canal or dam". "Run-off, storm and/or rain water" may be included or excepted, usually the latter, but the distinction is mostly recognised and adverted to: see, for example, *Mitor Investments Pty Ltd* v *General Accident Fire & Life Assurance Corporation Ltd* [1984] WAR 365; (1984) 3 ANZ Insurance Cases ¶60-562; *Prosser v AMP General Insurance Ltd* (supra); *Hazanee Pty Ltd v Elders Ltd* (supra).

In this context, "escape" means leaving: *Provincial Insurance Australia Pty Ltd v Consolidated Wood Products Pty Ltd* (supra); *K Sika Plastics Ltd v Cornhill Insurance Co Ltd* (supra). "Lake" usually means a large body of standing water surrounded by land, occupying a basin or depression and receiving the drainage of the surrounding area; but it usually excludes a claypan, marsh or swamp: *Hams v CGU Insurance Ltd* (supra). If the word, "overflow", is used as a non-technical expression, it will be given its ordinary meaning in its broadest sense to cover the discharge by a downpipe that cannot be accommodated by a drain that is obstructed by debris: *Oakleaf* v *Home Insurance Ltd* (1958) 14 DLR (2d) 535, 537; *K Sika Plastics Ltd v Cornhill Insurance Co Ltd* (supra at p 53).

"Surface water", when used in juxtaposition to "flood", means surface water produced from flooding from natural causes: *Re Partners Invest Ltd* v *Borough of Etobicoke* (1981) 124 DLR (3d) 125. It includes accumulated water from a severe storm, rain or melting snow or springs. It is not divested of that character because it flows as the result of gravity: *Poole* v *Sun Underwriters Insurance Co of NY* (1973) 274 NWR 658; *Kass* v *State Farm Fire & Casualty Co* (1989) 57 DLR (4th) 290. It is not necessary for surface water to lie for a time: *Harper v Zurich Australian Insurance Ltd* (supra). In this context, "rain" refers to damage by direct contact with falling rain: *Poole v Sun Underwriters Insurance Co of NY* (supra).

But this typical approach is often departed from. For example, in *Petersen* v *Union des Assurances de Paris IARD* (1997) 9 ANZ Insurance Cases ¶61-366, an exclusion applied to liability for flood damage unless it was due to flooding from drains, etc. "Flooding" was defined to mean "inundation in any way arising from any source outside the premises insured or containing the property insured", which was wider than its ordinary meaning. Property was damaged by water partly from overflowing drains but also partly from surface run-off with which the drains were unable to cope. The latter came within the definition. Because the damage was concurrently caused by a covered cause and an excluded one, the exclusion prevailed. If there is an exception as to damage from flooding from gutters, drains, etc, loss caused by such water's mingling with floodwater cannot come within the exception. See also *Provincial Insurance Australia Pty Ltd v Consolidated Wood Products Pty Ltd* (supra).

In *Hams v CGU Insurance Ltd* (supra), a building was damaged by a combination of run-off surface water and floodwaters. Damage by flood was excluded by the policy in derogation of the standard policy, and was defined to mean "inundation following the escape of water from the normal confines of any lake, reservoir, dam, river, creek or navigable canal, as a result of a natural phenomenon which has some element of violence, suddenness or largeness about it, but does not mean inundation by water from fixed apparatus, fixed tanks, fixed pipes or run-off water from surrounding areas". Again, if the damage was concurrently caused by a covered cause and an excluded cause, the exclusion would prevail, but not if the harm had been caused by the run-off water before the flood water arrived. It might be observed that there was little difficulty in distinguishing conceptually between run-off surface water and floodwater. This does not mean that the factual distinction will always be so easy to determine.

By analogy, in *Provincial Insurance Australia Pty Limited v Consolidated Wood Products Pty Ltd* (supra), it was defined as "the inundation of normally dry land by water escaping or released from the normal confines of any natural watercourse or lake, whether or not altered or modified, reservoir, canal or drain". A stormwater channel overflow caused harm to the insured's property. It was held that in this context and

having regard to the overall purpose of the whole provision, the drain was a canal. The purpose of the provision as a whole was to exclude all cover for harm arising from the escape of water from places where it tended to aggregate, whether occurring naturally or man-made. Further, the stormwater channel met the description of canal within its ordinary meaning in Australia.

Other cases where the departure of the definition from the ordinary meaning of the word led to distorted results are *British Columbia Ferry Corporation* v *Commonwealth Insurance Co* (1986) ILR ¶1-2024, where the definition included "waves", and *T & T Realty* v *Allstate Insurance Co of Canada* (1985) ILR ¶1-2094, but often this indicates that a special and unusual nature of the peril calls for a special and unusual definition.

It might be noted from the above that not all definitions have had an adverse result for the insured, and in some cases either their express terms or the construction put upon them by the court has had the effect of enlarging the cover or reducing any excluding effect of a reference to flood. The same result has followed the contextual influences upon a simple reference to "flood" without the presence of a definition.

Even the presence of a definition is not always helpful towards clarity because of the way in which it expresses its application. "Includes" is expansive or enlarging while "means" is restrictive of matters comprehended within the ordinary meaning of the qualified term: *Dilworth* v *Commissioner of Stamps* [1989] AC 105, 106; *Duncanson* v *Continental Insurance Co* (1990) 69 DLR (4th) 198; *Federal Commissioner of Taxation* v *St Hubert's Island Pty Ltd (in liq)* (1978) 138 CLR 210.

A flood may come within the ordinary or defined meaning of the term notwithstanding that it is not entirely the result of natural forces and has been contributed to by the insured's action. For example, it may be the result of the influence of the insured's operation upon normal rainfall, such as the blocking of the grating of a drain which causes the impeded flow to bank up and escape suddenly and in large quantity by other abnormal routes. It is no answer to a flood exclusion that the damage was caused by the insured's negligence which may answer the description of the general insuring promise of the policy, rather than by the flood. Some meaning and effect must be given to the exclusion. If the liability relates to injury caused by flood, the elements of the exclusion are met, and no unexpressed limitation of its application to causes other than the insured's negligence should be imported. The point of all this is the clear indication that the meaning of these expressions will be determined, not only by any arbitrary meaning attributed to them by definitions, but also that the purpose of the expression in the particular policy and the context in which it is embedded will often control the meaning to be given to it so that no general statements of meaning may be made.

It is of course possible for an insured to contract with an insurer for flood cover on terms that might more precisely identify what is meant by the expression. Experience teaches, however, that it is very difficult to arrive at a formula which will successfully avoid some degree of later dispute. It is a standard rule of construction that a document must be construed as a whole, and other provisions may seriously affect any attempt to standardise a definition. For example, if the cover were confined to damage by fire only, any definition of flood in the policy would be meaningless, no matter how comprehensive. There are many more potential influences on the construction of a definition, for example, the *ejusdem generis* rule, the effect of which in this field has been demonstrated above. This manifests the difficulty in the drafting of a standardised clause for legislative mandate.

This does not mean that there would be no benefit from an attempt to standardise a definition so that egregious departures from the common understanding of the word are not freely introduced through that means. A well-drafted form could probably be devised that would meet the expectations of reasonable insureds. It could also conform to the commercial needs of insurers who are eminently capable of functioning efficiently within such a given framework, particularly having the certainty of a standard definition that would apply equally to competitors.

The benefits having been recognised, it is necessary to address the negative features. First, a standardised version is necessarily inflexible. Absent any room for variation, the result in a particular application by a proposed insured for flood cover is a direct positive or negative. The insurer will agree to flood insurance in the standard terms or it will not. The absence of any opportunity to adjust the covered risk to meet the circumstances of the application makes for poor insurance practice to the detriment of the insurer or the insured. This would usually fall upon the insured by way of inability to obtain any flood insurance at all

from a reputable insurer. Of course, the simple answer is for the policy to avoid the use of “flood” and to express refinements of this feature of the cover in other terms, but then the standardisation of the definition is rendered nugatory except to the extent that it may be meaningful to any insureds who advert to it. The insurer would be required to bring it to the insured's attention, but this would be no different from the present necessity to do so in respect of the presence of a flood exclusion.

Thus, the successful standardisation of a formula would still not solve the problem as to whether an insurer should be obliged in every case to provide flood insurance, and if so, at what premium. An insured who builds substantial premises in a place precariously susceptible to flooding can hardly expect an insurer to accept such a risk without a choice. And even if this were mandated, such an insured can hardly expect to obtain cover for the same premium as that which would be paid by an insured in a safe location. The insurer must charge a premium actuarially adjusted to the risk, which would probably be prohibitive, or it would inevitably suffer the fate of HIH.

Alternatively, if the premium of such an insured were to be kept lower by adjusting upwards the premiums of other insureds, that would be grossly unfair to the other insureds. It is a well-accepted feature of insurance equity that an insured contributes to the insurance pool a premium that is fairly assessed according to the quality of the covered risk. To include in the premium of an insured with a certain risk a factor that is designed to meet the increased risk undertaken by another insured, perhaps irresponsibly, is alien to fair insurance dealing and conventional commercial standards.

Whether these difficulties may be resolved by a process of compromise is doubtful. An example may be found in a cognate area of legislation. Home buildings and home contents insurance, to which any standardised definition of “flood” might be expected to be relevant, are two of a group that are standardised by reg 9–16 of the *Insurance Contracts Regulations 1985* (Cth) pursuant to s 35 of the *Insurance Contracts Act 1984* (Cth) in respect of the events covered, which are the events which are usually found in contracts of insurance of the prescribed kind. The minimum amount of cover is prescribed and the exclusions of such policies are also those which would normally be found in contracts of the prescribed kind. In a case where flood damage is relevant it might be expected that there would be considerable controversy as to whether flood cover or a flood exclusion would have been usually found in such a policy.

In addition, an insurer is not required to provide standard cover if beforehand it clearly informs the insured in writing whether and how the policy provided departs from the prescribed standard form. This clear information may be communicated by the provision of a copy of the proposed policy if the information is reasonably set out in the normal fashion and not buried in an unusual mass of provisions: *Hams v CGU Insurance Ltd* (supra); *Marsh* v *CGU Insurance Ltd* [2004] NTCA 1; (2004) 13 ANZ Insurance Cases ¶61-594 at [11].

The difficulty is plain. Even if a mandated standardised definition of “flood” is formulated, then unless it is also required to be part of the cover of a standardised policy without room for exclusion by an insurer, which is an unlikely prospect, flood cover may simply be excluded from those policies where the insurer is not content to provide cover in accordance with the definition. If notification of its omission is given in accordance with *Hams* (supra), the cover will not be present. Fraud or misrepresentation aside, an insured has a responsibility to read the material supplied by the insurer, but it is notorious that this usually does not happen.

While the insured may be disadvantaged in this way, it is commercially impossible to expect insurers to grant flood insurance in all cases when it is applied for or to impose it on an insurer which has declined to include it in its cover and has clearly notified the insured in writing of its omission. The position is even clearer if the insured applies specifically for flood cover to be included in the policy and it is refused.

The only reasonably efficient area of expected benefit of standardisation would be in those cases where the insurer has agreed to provide flood cover. This might well be considered to be worthwhile so far as it goes, but its virtues must be weighed against its disadvantages, difficulties and limitations, and expectations of its benefits must not be exaggerated.

Miscellaneous matters

Both lessors and lessees of leased premises have an insurable interest in the premises to their full value for the purpose of flood insurance, notwithstanding that someone else has agreed to indemnify that party. Consequently, if the lessor is covered by a policy, the indemnity is not diminished by any obligation of the lessee to repair or reinstate the premises. The landlord can recover the full value. The tenant may recover to the extent of his or her liabilities under the lease, and if there is a covenant to repair or make good any damage, the interest amounts to the full replacement.

The liability of brokers might arise in relation to advice given to insured clients concerning flood insurance cover. Depending on the circumstances, a broker's duty in contract and tort is to exercise, to the standard of a competent and experienced broker, reasonable care to inform the client as to the availability of insurance so that the client can make an informed decision and give instructions as to what should be procured. The extent of this duty in a particular case will depend on complex principles which deserve separate consideration.