

From: [NSW Government](#)
To: [Flood Inquiry](#)
Subject: Floods Inquiry
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Attachments: [Richey W Submission.pdf](#)

Your details

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Submission details

I am making this submission as	Other
Submission type	I am making a personal submission
Consent to make submission public	I give my consent for this submission to be made public

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- [Richey W Submission.pdf](#)



Professor Mary O’Kane AC
Michael Fuller APM

No of Pages: 10
Dated: 20 May 2022

Dear Professor O’Kane & Mr Fuller

Re: 2022 Flood Inquiry Submission – Insurance Matters

1. Summary

- 1.1. It is my submission that the Inquiry should recommend the following:
- (a) That the NSW Government urges the Commonwealth to immediately expand the Northern Australia Reinsurance Scheme to cover the Northern NSW region for flood risk.
 - (b) That an alternative legislative framework be considered to lower the cost of flood insurance in the Northern Rivers region. That framework should incorporate measures to improve flood mitigation and management strategies.

2. Background

- 2.1. I am a barrister based in Sydney who often acts both for and against insurance companies in property damage cases and disputes about claim denials.
- 2.2. I was born and raised in Lismore and worked there as a solicitor for many years. I often return home because my family is based there. I have lived through many floods in Lismore (including the March 2022 flood).
- 2.3. I have been present in Lismore assisting with the recovery effort, including undertaking some *pro bono* work relating to insurance issues. I am concerned that a lack of affordable insurance in the Northern Rivers area will pose a significant impediment to any long-term reconstruction effort. I offer my insights into some of the difficulties faced in relation to flood insurance in that area, together with potential solutions which the Inquiry may recommend.

3. The Problem

- 3.1. This Inquiry has been directed to consider preparedness for future flood risks together with recovery for floods. It cannot be doubted that access to insurance is an important aspect of those matters.¹
- 3.2. It has been widely reported that flood insurance in the Lismore area is prohibitively expensive for a great many people. Insurance purists may argue that this situation simply reflects the risk of living in an area prone to flooding. However, that trite observation fails to grapple with the nuance of the situation on the ground.

¹ David Crichton, ‘Role of Insurance in Reducing Flood Risk’ (2008) 33(1) *Geneva Papers on Risk and Insurance - Issues and Practice* 117

- 3.3. Anecdotally, it has been my observation that those residents of Lismore who were not insured in respect of the 2022 flood events broadly fell into one of three groups:
- (a) Those for whom insurance coverage of any kind was never realistically obtainable. In any community, there will always be a cohort of people who simply cannot afford private insurance. That does not mean they should not be entitled to assistance after a catastrophic flood. However, it is important to recognise this reality when developing any ‘market based’ solutions to deal with affordable flood insurance (discussed below). Lismore, in particular, has a sizeable population of residents who will always be unaffected by such solutions.²
 - (b) Those who were otherwise insured for some risks - but simply could not afford the stupendous price of flood cover. The cost of flood insurance for some parts of Lismore is so unaffordable that it may as well not exist at all. For example, the cost of flood insurance in areas near the CBD can be in the order of \$100,000 per annum.³
 - (c) Those who might have been able to afford flood insurance but lived in areas that were traditionally unaffected by regular ‘Lismore floods.’ It has been my observation that the plight of these people has been somewhat overlooked in the media coverage about the catastrophe. While Lismore has a reputation for flooding, there are parts of the city that have never experienced anything like the 2022 floods. For example, there are many properties in East Lismore that were completely inundated despite never being touched by a flood in living memory.⁴ Suggesting that these people assumed the risk of flood by “living in Lismore” is rather like suggesting that someone in a North Sydney high-rise apartment is taking a conscious risk by not buying flood insurance.
- 3.4. In my experience, a widespread lack of insurance following the 2022 floods has given rise to the following specific issues:
- (a) Obviously, a significant number of uninsured people have no other recourse than to seek *ad hoc* government disaster payments. The administration of a large volume of claims for those payments has fallen entirely on the shoulders of government. Although insurers are often not highly regarded in the community, they are generally more adept at processing claims than government. There have been many complaints in

² Evidence to Senate Economics Legislation Committee, Parliament of Australia, Canberra, 8 March 2022 4 (Dr Settle)

³ Daniel Wood, ‘Is this the solution for unaffordable flood coverage?’, *Insurance Business Australia* (12 Mar 2022) <<https://www.insurancebusinessmag.com/au/news/natural-catastrophe/is-this-the-solution-for-unaffordable-flood-coverage-398378.aspx>>

⁴ See: Lismore City Council, *Lismore Flood and Floor Levels – East Lismore & Girards Hill* (Flood levels and floor heights)

the community about the timeliness of ‘larger’ government disaster relief payments.

- (b) Most insurers do cover “storm damage” or some other form of wording that deals with water ingress even if flood is excluded.⁵ As a result of desperation, many policyholders are now involved in disputes with their insurer about whether damage to their property was truly because of ‘flood’ as defined in their policy. In some instances, their arguments may have merit. However, to make the point they must commission costly hydrologist reports or retain lawyers to deal with complicated points of insurance law (like the doctrine of proximate cause). These disputes are diverting energy away from reconstruction efforts by people who otherwise would be integral to re-establishing the local community.
- (c) There is inconsistency in how insurers are handling claims. For example, some insurers are more willing to provide small *ex gratia* payments than others. Some are providing limited accommodation assistance payments despite the absence of flood cover. Others are not. This is causing confusion and anxiety in the community.
- (d) Premiums have skyrocketed upon renewal. This is particularly pronounced for those who live in lower-risk areas of Lismore who are now seeking to purchase flood insurance after the floods. Flood coverage is now practically unattainable for even more of the Lismore area. The market faces practical collapse.

4. **Why is this still a Problem?**

- 4.1. None of the above problems are new. The lack of useful flood insurance in Australia has been the subject of almost many years of discussion and report.
- 4.2. Following the 1974 Brisbane floods, it was widely reported that thousands of victims were uninsured against flood damage. This culminated in a recommendation to create a government-backed natural disaster scheme. That scheme would be funded through the imposition of compulsory levies, with insurers acting as agents of the government scheme.⁶
- 4.3. By 1976 there was in-principle support for such a scheme from the Commonwealth Government. Somewhat presciently, a Treasury Working Group acknowledged that:

“because of their unpredictability and their potential to cause catastrophic losses, [floods] are regarded by the insurance industry as basically uninsurable on a commercially viable basis”⁷

⁵ E.g. NRMA, *Product Disclosure Statement* (July 2021) p30-31

⁶ Insurance Conference Committee, *Feasibility Study into the Introduction of a Natural Disaster Insurance Scheme for Australia* (October 1974)

⁷ Treasury Working Party, *Natural Disaster Insurance Scheme for Australia Discussion Paper*, Parliament of Australia (Parliamentary Paper No. 409/1976, December 1976) 17

- 4.4. That group recommended the establishment of a Commonwealth-backed insurance pool to cover, *inter alia*, catastrophic floods. Importantly, a committee would determine the applicable rates for cover – which insurers would be required to charge policyholders.⁸
- 4.5. The policy was shelved by 1979, mainly on ideological grounds.⁹ There have been occasional dalliances with reviving the idea, but they never took off. The current plan to make natural disaster insurance more affordable is a much more subdued affair.

5. The Reinsurance Scheme

- 5.1. As the Inquiry will be aware, around the time of the 2022 floods, the Commonwealth Government passed the Treasury Laws Amendment (Cyclone and Flood Damage Reinsurance Pool) Bill 2022 (Cth). This Bill established a reinsurance pool covering the risk of property damage caused by the risk of flood and cyclone damage in Northern Australia (“**the Reinsurance Scheme**”).
- 5.2. Large insurers are required to participate in the scheme and are required to enter into a reinsurance treaty with the Australian Reinsurance Pool Corporation (“**ARPC**”).¹⁰ Insurers must cede all eligible policies under the scheme (i.e. those covering flood and cyclone damage).¹¹ The ARPC then sets premiums to be paid by insurance companies for those reinsurance contracts (the method for setting those premiums is not transparent).¹² As the scheme is government-backed, the intention is that reinsurance costs for insurers will be heavily discounted.
- 5.3. A government backed reinsurance pool to cover flood risks is not novel. A somewhat similar scheme has been implemented in the United Kingdom after it became apparent that householders were unable to obtain affordable flood insurance in the private market.¹³
- 5.4. Unlike the United Kingdom reinsurance pool, however, the Reinsurance Scheme is not targeted toward managing natural disasters or floods in any way. The entire scheme exists as a series of amendments to the *Terrorism Insurance Act 2003* (Cth). That Act established a reinsurance pool to be managed by the ARPC after the withdrawal of terrorism cover by insurers following the events of 11 September 2001.
- 5.5. In effect, the Reinsurance Scheme has been “tacked on” to an existing legislative structure that is not specifically directed at dealing with the problem of unaffordable flood insurance or preparedness for floods in the future.

⁸ *Ibid*, 2

⁹ John Howard, *Natural Disaster Insurance: A Policy Information Paper issued by the Treasurer* (May 1979) iii

¹⁰ *Terrorism and Cyclone Insurance Act 2003* (Cth) Pt 3

¹¹ *Ibid* s8A

¹² *Ibid* s8D

¹³ *Water Act 2014* (UK) Pt 4

6. Should the Reinsurance Scheme Cover Northern NSW?

- 6.1. The failures of the insurance market in Northern Australia justifying the Reinsurance Scheme are identical to those facing the Northern Rivers in the immediate aftermath of the 2022 floods.¹⁴ In my view, those failures are in fact *worse* in this region. Yet the scheme does not operate in this area.
- 6.2. There have been increasing calls to extend the scheme to cover flood insurance in the Northern Rivers. There has already been some bipartisan support for that course.¹⁵ Some insurers have already supported the expansion of the scheme on that basis.¹⁶
- 6.3. The Reinsurance Scheme is by no means perfect. The ACCC has already given very detailed consideration to the idea and recommended *against* its introduction.¹⁷
- 6.4. The chief problem with the Reinsurance Scheme is that it simply provides a subsidy to industry. It throws taxpayer money at insurance companies with few strings attached. A Government-backed reinsurance pool for flood risk should – in theory – lower the technical premium an insurer is required to impose in order to cover flood risk.¹⁸ In turn, it is hoped that insurers will pass-on their savings to customers by lowering consumer premiums.
- 6.5. This is an optimistic hope. There is no formal mechanism in the Reinsurance Scheme which *requires* insurers to pass-on any savings at all. Perhaps more realistically: There is no mechanism to prevent insurers from passing-on only *some* savings (if only to avoid public backlash and tighter regulation if they fail to pass on any). The Insurance Council has not given a firm commitment that the Scheme will achieve any real premium relief.¹⁹ There is real likelihood that the scheme will only lower premiums by a very small amount.²⁰
- 6.6. More importantly: Dr. Antonia Settle has observed that the Scheme is a very blunt instrument.²¹ It is not targeted in any way. It does not require policyholders to undertake any flood-mitigation measures in exchange for taxpayer-backed insurance. Nor does it do anything to address transparency in how premiums are set for individual properties. Insurers have been setting premiums at an increasingly granular level for some time. Two houses on the same street can have

¹⁴ Senate Economics Legislation Committee, *Treasury Laws Amendment (Cyclone and Flood Damage Reinsurance Pool) Bill 2022* (Report, March 2022) 1.3 -1.8

¹⁵ Josh Butler, 'Pressure mounts on Morrison government to include flooding in \$10bn reinsurance pool' *Guardian Australia* (11 March 2022) <<https://www.theguardian.com/australia-news/2022/mar/11/pressure-mounts-on-morrison-government-to-include-flooding-in-10bn-reinsurance-pool>>

¹⁶ Evidence to Senate Economics Legislation Committee, Parliament of Australia, Canberra, 8 March 2022 19 (Ms Green, RACQ)

¹⁷ Australian Competition & Consumer Commission, *Northern Australia insurance inquiry - final report*, 28 December 2020, Recommendation 8.1

¹⁸ *Ibid* 160

¹⁹ Evidence to Senate Economics Legislation Committee, Parliament of Australia, Canberra, 8 March 2022 27 (Mr Jones)

²⁰ Northern Australia Insurance Taskforce, Final Report, (Canberra: Treasury, 2015), xi, xvii.

²¹ *Ibid* 1 (Dr Settle)

vastly different premiums for flood-cover, and it is often not obvious why that is.²² In my experience this has been particularly problematic for Lismore.²³ This “black box” phenomenon is likely to pose problems for the reconstruction effort for the region. That is especially as premiums are recalculated in light of the 2022 floods which have now triggered reinsurance arrangements for many insurers.²⁴

- 6.7. There are other defects with the way in which the Reinsurance Scheme was legislated.²⁵ Nevertheless, it is my suggestion this Inquiry should recommend that the Reinsurance Scheme be urgently extended to cover the Northern Rivers region in relation to flood risks.
- 6.8. While the Scheme is not perfect, it seems absurd that legislation expressly designed to improve flood insurance does not apply to the part of Australia that has just faced the most expensive flooding event of all time.²⁶ Ironically, the CEO of the Insurance Council was unable to give evidence in the Senate Committee considering the Reinsurance Scheme owing to his presence in Lismore after the floods.²⁷ Despite this, the Bill was not amended to incorporate the Northern Rivers.
- 6.9. The Commonwealth has staked the success of the Scheme on a requirement that the ACCC monitor premium prices and periodically report on whether the Scheme is working.²⁸ That, at least, would provide a future opportunity for further refinement of the Scheme to become more tailored to flood risks (detailed below).
- 6.10. It might also be noted that the ACCC’s reluctance to endorse the Reinsurance Scheme was predicated on a finding that the private insurance market generally in Northern Australia had not, in fact, failed.²⁹ This Inquiry may find that the flood-insurance market in Northern New South Wales now faces practical market failure. The availability of flood insurance will be vital for attracting new business and residents to the Northern Rivers area to facilitate reconstruction. Insurance also plays a pivotal role in planning for any future flood events. If the Reinsurance Scheme is not broadened to include this area, the Northern Rivers region may miss a vital opportunity to *finally* make some headway in making flood insurance viable in this area.

²² Australian Competition & Consumer Commission, *Northern Australia insurance inquiry - final report*, 28 December 2020, 352

²³ Liam Walsh, ‘How ‘rain bomb’ vexed insurance models: Suncorp’, *The Australian Financial Review* (Sydney, 16 March 2022)

²⁴ Liam Walsh, ‘Floods pull multiple reinsurance triggers, pressuring prices’, *The Australian Financial Review* (Sydney 1 March 2022)

²⁵ For example, the scheme completely fails to cover “discretionary risk mutual” products, which are an important part of the insurance market.

²⁶ Amila Dedovic, ‘QLD and NSW flooding insurance claims to cost a record \$3.35 billion’ *Business News Australia* (Sydney, 3 May 2022)

²⁷ *Terrorism and Cyclone Insurance Act 2003* (Cth) s41; Evidence to Senate Economics Legislation Committee, Parliament of Australia, Canberra, 8 March 2022 27 (Mr Jones)

²⁸ *Ibid*

²⁹ Australian Competition & Consumer Commission, *Northern Australia insurance inquiry - final report*, 28 December 2020, 453

- 6.11. This Inquiry has been directed to consider coordination and collaboration between the NSW Government and the Australian Government. Accordingly, I respectfully suggest that it recommend that NSW urge the Commonwealth to expand the Reinsurance Scheme to incorporate the Northern NSW Region. The necessary amendments to achieve that result would be trivial.³⁰

7. **A Better Model**

- 7.1. While the Reinsurance Scheme is a start to addressing the insurance crisis facing the Northern Rivers region, it is plainly insufficient.
- 7.2. The Insurance Council of Australia (among others) has long advocated for increased spending on flood mitigation measures to lower insurance costs.³¹ The Reinsurance Scheme, however, does very little to ‘tie’ government subsidised insurance pricing to better flood management in places like Lismore. While the authority administering the Scheme promotes mitigation efforts, there is no strong legislative or regulatory requirement for this to occur.
- 7.3. A better legislative model would make the provision of government funds for cheaper flood insurance (by way of a pool or otherwise) contingent upon better flood management strategies. For example:
- (a) Targeting subsidies to ensure very-low income households can avail themselves of *some* form of basic flood cover.
 - (b) Requiring that any insurer-authorised rebuilds adhere to clearly defined construction standards that improve flood resilience. To take a very minor example: in some of the worst-affected parts of Lismore, there is a stark contrast between the post-flood condition of brick homes compared to their weatherboard counterparts.
 - (c) Tying reduced premiums to acceptance of mitigation-assistance when offered (for example, the elevation of structures). If such assistance is refused, participation in the scheme is either disallowed, or flood premiums are calculated at true actuarial rates.
 - (d) Mandating that policyholders participate in a voluntary land “Buy Back Program” as a condition of access to government-backed flood insurance. Insured properties with a very high frequency of flood-loss claims may be eligible for a voluntary buyout. If the offer for a buyout is refused under certain conditions, government-backed flood insurance is withdrawn.
 - (e) Requiring far greater transparency in how premiums are set for individual properties (for example, by reference to detailed flood maps). Such transparency would make it clearer *why* premiums might be so high for a particular property and whether any mitigation measures could reduce that

³⁰ See: Treasury Laws Amendment (Cyclone and Flood Damage Reinsurance Pool) Bill 2022, Amendments to be moved by Senator McKim, in committee of the whole, sheet 1559

³¹ Insurance Council of Australia, ‘Building a more resilient Australia’ (February 2022)

cost. I am aware that many residents of Lismore renewing their policies post-flood are seeing wildly different premiums between insurers for houses in the same areas. There is no obvious “price signal” that is indicating where risk lies (or how much that risk is actually informing an astronomically increased premium).

- 7.4. A somewhat useful model to implement (in broad strokes) would be the United States *National Flood Insurance Program* (“**NFIP**”). I immediately note that the NFIP is widely regarded as an abysmal failure.³² I agree with that assessment. However, this was not always the case.
- 7.5. The NFIP was established to address the failure of the private flood insurance market after the 1927 Mississippi River flood.³³ Following this event, the Federal Government made several concerted attempts to establish a national system of flood insurance, eventually succeeding with the passage of legislation in 1968.³⁴
- 7.6. The current NFIP is astonishingly complex in terms of its regulatory framework. But the key to the program as an ‘idea’ is that subsidized flood insurance should come with many strings attached. The Federal Government backstops flood-insurance for participants who otherwise could not afford premiums that reflect actual flood risk. Individual risk is thus transferred to the government, at least in part. The *quid pro quo* is that participants must adopt and enforce certain floodplain management regulations to reduce the nation’s comprehensive risk of flood with the attendant cost on the community.³⁵ The unrealized aspiration of the program was to manage a gradual retreat from development in the nation’s floodplains.³⁶
- 7.7. As part of the NFIP, the Federal Emergency Management Agency (“**FEMA**”) is meant to fund a “buyout” program for properties that very frequently flood. The careful management of such programs is vital. Unless implemented correctly, these programs have the potential to damage local communities and leave ‘holes’ in otherwise populated areas. For that reason, the implementation of FEMA buyouts is mainly left to local governments who have planned a long-term retreat of high-risk flood areas.³⁷ The introduction of a similar scheme could be investigated and incorporated more tailored flood-insurance legislation in Australia.
- 7.8. An additional aspect of the NFIP is that some disaster-funding is managed ‘through’ the program. For example, recipients of certain flood disaster assistance

³² Eli Lehrer, ‘Reforming the National Flood Insurance Program after 35 Years of Failure’, *Competitive Enterprise Institute* [2008] (2), 11

³³ Scott Gabriel Knowles & Howard C. Kunreuther, ‘Troubled Waters: The National Flood Insurance Program in Historical Perspective’, *Journal of Policy History* 26(3) 327

³⁴ *Ibid* 327

³⁵ Becky Hayat and Robert Moore, ‘Addressing Affordability and Long-Term Resiliency Through the National Flood Insurance Program’ *Environmental Law Reporter* 45 (10338) 4-2014

³⁶ Gabriel & Howard, above n33, 333

³⁷ OpenFEMA Dataset: Hazard Mitigation Grant Program - Property Acquisitions <
<https://www.fema.gov/openfema-data-page/hazard-mitigation-grant-program-property-acquisitions-0>>

payments are required to purchase NFIP flood insurance.³⁸ Low-income recipients who were otherwise uninsured can qualify to be basically ‘gifted’ a temporary policy.³⁹ The intention is that disaster relief offered to uninsured persons after a flood is still ultimately subject to conditions to better improve flood management in the future. This Inquiry might note that much of the *ad hoc* disaster relief granted by the State and Federal governments in the aftermath of the floods is not directed toward ensuring any future flood reliance.

- 7.9. The failures of the NFIP have been well documented. In the main, most of those failures can be ascribed to broader issues in the American political landscape.⁴⁰ Legislative ‘tinkering’ with the program over many years neutered its ability to properly achieve flood mitigation. The modern NFIP is basically just an expensive white-elephant for subsidised flood insurance. Ironically, it has created a moral hazard by *encouraging* people to live in flood-risk zones.⁴¹
- 7.10. Nevertheless, the premise of the NFIP was a sound when it was conceived. Indeed, changes were recently made to the United Kingdom reinsurance scheme to add measures similar to those originally envisaged by the NFIP. For example, payment of claims made with extra funds to ensure that any repairs adhere to flood resilience guidelines (a “build back better” programme).⁴² The authority overseeing the UK scheme has also been tasked with overseeing flood mitigation measures as part of its remit.
- 7.11. Unfortunately, the legislative structure of the Reinsurance Scheme is simply not amenable to implemented any of the measures outlined above. The ARPC is just not a “flood management” authority. The legislative structure of the scheme should be altered such that the pool is governed by something like an ‘Australian Flood Risk Authority’ imbued with a statutory objective to deal with future flood risks.
- 7.12. In 2011 the Treasury’s National Disaster Insurance Review recommended that an agency be created to “manage the national coordination of flood risk management **and** to operate a system of premium discounts and a flood risk reinsurance facility, supported by a funding guarantee from the Commonwealth.”⁴³ The Reinsurance Scheme goes a very small way in achieving this goal, but it leaves-out the most important part.

³⁸ National Flood Insurance Program, *Flood Insurance Requirements for Recipients of Federal Disaster Assistance* (October 2017)

³⁹ OpenFEMA Dataset: Group Flood Insurance: How It Works < <https://www.fema.gov/press-release/20210318/group-flood-insurance-how-it-works> > I hasten to add: The actual implementation of this program has been handled poorly, but the idea is sound.

⁴⁰ Eli Lehrer, ‘Reforming the National Flood Insurance Program after 35 Years of Failure’, *Competitive Enterprise Institute* [2008] (2), 20

⁴¹ Kevin Starback, ‘Moral hazard: how the national flood insurance program is limiting risk reduction’ (December 2016)

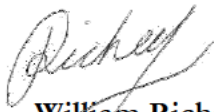
⁴² FloodRe, Regulation 27: The Quinquennial Review (2019)

⁴³ Natural Disaster Insurance Review: Inquiry into flood insurance and related matters (2011) 3 (emphasis added)

7.13. Communities like Lismore now face an existential crisis in the face of the 2022 floods. A lack of affordable flood insurance will worsen that crisis. The solution to that problem is not to simply throw a lot of money at the insurance industry in the hope that might make premiums cheaper. This Inquiry should recommend that the Commonwealth government consider more tailored legislation to lower the cost of flood insurance which also incorporates flood mitigation and management strategies.

7.14. Thank you for your consideration of these matters.

Yours faithfully,



William Richey
Barrister

Garfield Barwick Chambers