

SNAPSHOT OF FLOOD DETERMINATIONS

Summary

To help industry and consumers better understand how the Financial Ombudsman Service (FOS) reached its decisions around key issues, we have collated a selection of Determinations that highlight common topics. The summaries below are only a top-line guide to the Determinations. To properly understand the findings please read the original Determination on our website by clicking on the relevant link.

When assessing flood-related disputes, FOS found a number of key issues frequently arose. In particular, disputes about whether consumers were clearly informed of their coverage, policy exclusions and definitions, and the use of hydrology reports, were common.

FOS also notes that a number of the issues addressed in these Determinations touch upon areas covered in the *Natural Disaster Insurance Review*. On Monday, 14 November 2011, Assistant Treasurer, the Hon Bill Shorten MP, and Attorney General, the Hon Robert McClelland MP, released the Government's responses to the Review recommendations and issued a consultation paper, 'Reforming Flood Insurance: A Proposal to Improve Availability and Transparency'.

FOS's approach

We focus on three key areas in this document:

- whether the consumer was clearly informed of policy coverage
- whether the consumer had received all pertinent documentation
- the use and analysis of hydrology reports and the application of exclusion clauses

Our approach when considering our assessment of these areas is outlined in detail below.

Clearly inform

A number of issues regularly arise when considering section 35 of the Insurance Contracts Act and the obligation to clearly inform. In most cases, the obligation to clearly inform is satisfied by the provision of the product disclosure statement (PDS). However, there are circumstances in which the complexity of, or confusions within, the policy mean the provision of the policy document itself is not sufficient.

When FOS looks at whether section 35 has been met, in each case we take into account the context of the document and all the circumstances of the provision of the document.

Particularly relevant to FOS's consideration is the process that has occurred on inception. In this regard, the provision of call recording can be a most useful tool. A review of the Determinations that have been issued so far shows that in some circumstances people have been misled by the sales consultant into a belief that the policy would extend to cover flood. In other circumstances, whilst some confusion may have existed, the call recording has clearly identified the person has either been informed of the lack of flood cover or the limitation of flood cover.

Dispatch of documentation

In issue 3 of our online publication, *The Circular* (www.fos.org.au/circular), FOS spelt out the requirements to prove dispatch of documentation where that is an issue in dispute (reference attached).

Again, in considering the dispatch of documentation as part of the consideration to clearly inform, there may be circumstances where FOS accepts that the limitation or exclusion of flood cover is known to a consumer even though the consumer had not received the policy document, or claims not to have received the policy document. Again, call recording may assist with respect to this. In this regard, FOS will consider whether the insured knew, or a reasonable person in the circumstances could have been expected to have known. Particularly relevant here will be whether the applicant has utilised the services of a broker. Where a broker has been utilised then section 71 of the Insurance Contracts Act will act to relieve the insurer of the need to provide the document to the consumer.

In some circumstances an insurer may have difficulty proving the dispatch of documentation because there is difficulty proving the precise posting of a document. When considering whether the dispatch of documentation in a particular case is satisfactory, FOS will consider the process and system that the financial services provider (FSP) and/or its representative has in place to ensure documents are dispatched. Included in this will be issues such as whether a PDS is sent with a renewal document, whether the processes are regularly audited, and relevant Statutory Declarations.

Hydrology reports / Application of policy exclusion

The use of hydrology has varied from dispute to dispute.

A general criticism of most hydrology provided, in particular where that hydrology does not follow from a site inspection, is the lack of information as to the initial inundation of a property. Most hydrology, in particular the non-specific hydrology, refers to the peak level of inundation. In doing so, the hydrology will often recognise the possibility of stormwater run-off, but will not identify whether it has occurred in a particular set of circumstances.

From FOS site inspections, discussions with the claimants and evidence provided, FOS has been

persuaded in many cases that the initial source of inundation was stormwater run-off and that the FSP had not, on the balance of probabilities, established the application of the flood exclusion at least to the initial inundation of the property.

FOS has also observed inconsistencies in the hydrology opinions offered, relating to similar areas. Often this may be associated with inconsistent information provided to the hydrologists, or consideration of whether the hydrology report is based on a site inspection or not.

Although FOS has observed inconsistencies, and clearly the evidence provided following a site inspection is preferable, FOS acknowledges that the information contained in the ICA hydrology reports for the regions is most helpful.

As a broad approach to the hydrology reports when considering a dispute, FOS will consider:

- whether the hydrology relates to a site inspection report
- whether the hydrology information has been fully exchanged with the consumer
- whether there are inconsistencies in the hydrology information and Statutory Declarations that may be provided relating to the report
- whether the report deals with initial inundation or peak inundation
- the various policy definitions associated with flood water as compared to stormwater run-off, flash flooding and rain water
- whether the home was first damaged by stormwater run-off and the level of such run-off
- whether the damage resulted from flood water
- whether the hydrology report identifies when the river broke its banks
- whether the water was ever capable of draining into a water course
- evidence as to the direction of the flow of water.

Representative examples

These summaries are a top-line guide to the Determinations. To properly understand the findings please read the original Determination on our website by clicking on the relevant link.

Clearly inform / section 35, Insurance Contracts Act 1984

233281

The applicant's decision to accept the policy was influenced by the financial service provider's unintentional misrepresentation of the cover at the time the policy was arranged. The FSP was therefore required to indemnify the applicant.

Full Determination:
<https://forms.fos.org.au/DapWeb/CaseFiles/FOSSIC/233281.pdf>

226459

At the time of the inception of the policy, the FSP did not clearly inform the applicant of the flood cover limitation. As a result the FSP was required to pay the applicant in full.

Whilst in most circumstances the provision of a PDS will satisfy the need to clearly inform, that will not always be the case. When considering whether the applicant has been clearly informed that their policy deviates from standard cover, it is necessary to consider the whole circumstances that have led to policy inception. Any conversations held prior to the inception of the policy, provision of insurance certificate and policy documentation were all considered. The FSP's conduct at inception was misleading as the applicant was led to believe that the policy provided full flood cover.

Full Determination:
<https://forms.fos.org.au/DapWeb/CaseFiles/FOSSIC/226459.pdf>

237610

The Determination centres on whether the applicant was clearly informed and given relevant documentation. The FSP operated through an intermediary and no evidence was provided by the FSP that they had any method of auditing the process adopted by the intermediary. The decision discusses the relevant issues to be considered on dispatch of documents and broadens the discussion published in issue 3 of our online publication, *The Circular*.

Full Determination:
<https://forms.fos.org.au/DapWeb/CaseFiles/FOSSIC/237610.pdf>

231567

The FSP's policy provided limited flood cover. It was found that the inundation was due to stormwater and therefore, the policy limit in relation to flood does not apply. Furthermore, in additional discussions about policy wording around flood coverage the Panel found the FSP did not meet the onus to clearly inform the insured of the applicable limits to the prescribed cover.

Full Determination:
<https://forms.fos.org.au/DapWeb/CaseFiles/FOSSIC/231567.pdf>

239677

The applicant suffered prejudice as a result of the FSP's failure to clearly inform them that their policy excluded flood coverage at the time of arranging the policy.

The applicant arranged the policy through an agent of the insurer. Based on representations made by the agent, the applicant changed his insurance to the insurer. The agent denied providing misleading advice. In assessing this dispute FOS received conflicting evidence from the applicant and the agent. In its findings FOS found that the FSP and the agent failed to clearly inform the applicant of the cover limitations.

Full Determination:
<https://forms.fos.org.au/DapWeb/CaseFiles/FOSSIC/239677.pdf>

239225

The FSP failed to establish that it had provided a PDS to the applicant. As such, the FSP had failed to clearly inform the applicant and was liable for their claim.

Full Determination:

<https://forms.fos.org.au/DapWeb/CaseFiles/FOSSIC/239225.pdf>

239722

The applicant alleged the FSP provided misleading information on inception of the policy as to the extent of flood cover. The FSP was unable to provide copies of relevant call recordings. The applicant could not provide proof of when her calls to the FSP took place. The fact that a PDS had been sent out was not in dispute. The Panel determined that the FSP had complied with its obligations under sections 35 and 69 of the Insurance Contracts Act by clearly informing the applicant of the policy limitations.

Full Determination:

<https://forms.fos.org.au/DapWeb/CaseFiles/FOSSIC/239722.pdf>

235632

The applicant claimed they had not been clearly informed of the flood exclusion. The FSP provided detailed evidence to prove dispatch of the documents to the applicants. The Panel was satisfied that dispatch had been proved.

Full Determination:

<https://forms.fos.org.au/DapWeb/CaseFiles/FOSSIC/235632.pdf>

234912

The FSP was able to produce a call recording to confirm advice provided on inception of policy. It confirmed that the policy did not cover flood.

Full Determination:

<https://forms.fos.org.au/DapWeb/CaseFiles/FOSSIC/234912.pdf>

Regulation 13, Insurance Contracts Regulations 1985 - prescribed contract

The following Determinations discuss the prescribed contract under regulation 13, which followed FOS's finding that the FSP had failed to comply with section 35.

237610**Full Determination:**

<https://forms.fos.org.au/DapWeb/CaseFiles/FOSSIC/237610.pdf>

239677**Full Determination:**

<https://forms.fos.org.au/DapWeb/CaseFiles/FOSSIC/239677.pdf>

Application of policy exclusion

The following Determinations discuss the information exchanged, including hydrology, and how that influences Determinations.

239347

The applicant provided diagrams, rainfall data, a flood management group report as well as their observations to maintain the inundation was due to stormwater.

The FSP relied on an area hydrology report. The FSP failed to send an assessor to the property, or to address the applicant's information. FOS determined that the FSP had failed to prove the loss was caused by an excluded event.

Full Determination:

<https://forms.fos.org.au/DapWeb/CaseFiles/FOSSIC/239347.pdf>

244080

The FSP relied on a general area hydrology report and loss adjusters report. FOS found there to be issues with discrepancies in information provided. The general hydrology report conceded there was possible site stormwater inundation. No site specific inspection/report was conducted. FOS determined that the FSP failed to prove application of exclusion.

Full Determination:

<https://forms.fos.org.au/DapWeb/CaseFiles/FOSSIC/244080.pdf>

231567

Differences were found between the hydrology report and the FSP's statutory declarations relating to the report. A newspaper article submitted as part of the FSP's documentation which used the word 'flood' was of little practical use to determining the outcome of this claim. The FSP failed to establish loss due solely to floodwater. The Panel discussed proximate cause and relevance of establishing whether initial inundation was due to flood/storm.

Full Determination:

<https://forms.fos.org.au/DapWeb/CaseFiles/FOSSIC/231567.pdf>

238186

The FSP denied the applicant's claim without commissioning a hydrologist report. There was nothing in the material submitted by the FSP to negate the applicant's evidence that their home was first damaged by run-off water.

Full Determination:

<https://forms.fos.org.au/DapWeb/CaseFiles/FOSSIC/238186.pdf>

229796

The FSP provided site specific hydrology and an assessor's report. The Panel obtained information from the applicant. The Panel was satisfied that the evidence established the exclusion for flood applied.

Full Determination:

<https://forms.fos.org.au/DapWeb/CaseFiles/FOSSIC/229796.pdf>

Establishing quantum - availability of invoices**237610**

FOS commented that catastrophic events like those affecting Queensland in 2010 / 2011 do not always permit observance of all technical niceties such as invoices and the like. Parties are encouraged to work co-operatively and speedily to establish a fair and reasonable value to the claim (quantum).

Full Determination:

<https://forms.fos.org.au/DapWeb/CaseFiles/FOSSIC/237610.pdf>

Proof of Dispatch**237610**

The FSP operated through an intermediary and no evidence was provided by the FSP that they had any method of auditing the process adopted by the intermediary. The decision discusses the relevant issues to be considered on dispatch of documents, including discussing *Marsh v CGU Limited* (2004 13 ANZ Insurance Cases), and broadening the discussion published in issue 3 of our online publication, *The Circular*.

Full Determination:

<https://forms.fos.org.au/DapWeb/CaseFiles/FOSSIC/237610.pdf>

239225

The applicants alleged they had not received the documentation / PDS. The Panel discussion focussed on the proof of dispatch. The FSP was unable to provide adequate proof that the PDS had been provided to the applicant.

Full Determination:

<https://forms.fos.org.au/DapWeb/CaseFiles/FOSSIC/239225.pdf>

Exceptional event

241175

This Determination looks at the events impacting on Grantham and whether the event should be classified as a flood. Whilst satisfied the PDS clearly informed of the flood exclusion, the Panel, following consideration of the relevant evidence, in particular the hydrology report, distinguished between this event and a 'normal flood event'. The Panel determined that the area was affected by a wall of water that did not escape or overflow the watercourse but engulfed the area. Relying on this, and section 8.2 of FOS's Terms of Reference, the Panel determined the FSP should pay the claim.

Full Determination:

<https://forms.fos.org.au/DapWeb/CaseFiles/FOSSIC/241175.pdf>

Water not capable of draining into watercourse

234622

Reference to *K Sika Plastics v Cornhill Insurance* [1982] 2 NZLR 50 (CA).

Full Determination:

<https://forms.fos.org.au/DapWeb/CaseFiles/FOSSIC/234622.pdf>

Prejudice / Removal of contents

232330

The applicant maintained that their contents were disposed of by volunteers without discussion. The FSP denied the claim based on flood exclusion. The Panel accepted that flood exclusion applied. The Panel determined that in the circumstances, the removal and disposal of contents by volunteers did not constitute a loss under an insured event.

Full Determination:

<https://forms.fos.org.au/DapWeb/CaseFiles/FOSSIC/232330.pdf>

Keeping informed about flood determinations

If you are interested in a particular topic or issue that is not covered in this document, please let us know by emailing us at publications@fos.org.au.

Please regularly check back with our website, www.fos.org.au, as we will be updating the list of highlighted Determinations as further cases are finalised.

The full Determinations for each of the cases highlighted above are available at the FOS website, www.fos.org.au. To properly understand the findings please read the original Determination on our website by clicking on the relevant link.