
**QUEENSLAND FLOODS COMMISSION OF INQUIRY
SECOND AFFIDAVIT OF BRADLEY PETER HEATH
SWORN 20/10/11**

QFCI

Date: 27/10/11 JM

Exhibit Number: 900

QUEENSLAND FLOODS COMMISSION OF INQUIRY

Commissions of Inquiry Act 1950

SECOND AFFIDAVIT

I, **BRADLEY PETER HEATH** of c/- [REDACTED] Logan Road Eight Mile Plains, Brisbane in the State of Queensland, Chief Executive Officer, state on oath:

BACKGROUND

1. I am the Chief Executive Officer ("CEO") of RACQ Insurance Limited (**RACQ Insurance**).
2. This affidavit is provided on behalf of RACQ Insurance in response to a notice dated 14 October 2011 given to me by Justice C E Holmes, Commissioner of Inquiry, pursuant to section 5(1) (d) of the *Commissions of Inquiry Act 1950* (Qld), to provide information in respect of matters listed in that notice (**Requirement**). Copies of the cover letter forwarding the Requirement and the Requirement itself are exhibited to this affidavit as **Exhibits 1 and 2**.

RESPONSE TO REQUIREMENT

3. The matters set out below are not, or are not necessarily, matters of which I have direct knowledge other than by having regard to the records of RACQ Insurance (which I have done in order to provide this affidavit).
4. I have, with the assistance of others, assembled information and material to respond to the Requirement. I have, however, not been able to personally review all of the material which has been assembled for that purpose or exhibited to this affidavit.
5. For ease of reference I have set out in this affidavit the headings and sub-paragraphs from the Requirement and provided my response to them below.

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Signed:

[REDACTED]

Taken by

[REDACTED]

AFFIDAVIT

Filed on behalf of RACQ Insurance Limited

COOPER GRACE WARD
Level 21, 400 George Street
Brisbane 4000 Australia

T 61 7 3231 2444
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1. **Copies of records of all communications between RACQ Insurance Limited (and/or its legal representatives) and:**
 - 1.1. **The Financial Ombudsman Service, concerning the matters the subject of paragraph 164 of the second affidavit of Mr Graham Dale (sworn 19 September 2011) and paragraphs 59 to 62 of the fifth affidavit of Mr Dale (sworn on 21 September 2011); and**
6. **Exhibit 3** to this affidavit is a bundle of documents containing all records of the communications between RACQ Insurance and the Financial Ombudsman Service (FOS) concerning the matters referred to in paragraph 1.1 of the Requirement.
7. RACQ Insurance is currently preparing its response to the letter dated 28 September 2011 from FOS to Mr [REDACTED]. The response will explain that RACQ Insurance does not agree that it has breached the Code as alleged, and explain the basis of RACQ Insurance's position. I will arrange for a copy of that response to be provided to the Commission once it has been sent.
 - 1.2 **ASIC, concerning the matters the subject of paragraphs 63 to 66 of the fifth affidavit of Mr Dale (sworn on 21 September 2011).**
8. **Exhibit 4** to this affidavit is a bundle of documents containing all records of the communications between RACQ Insurance and ASIC concerning the matters referred to in paragraph 1.2 of the Requirement.

SWORN by BRADLEY PETER HEATH on:

at *Eight Mile Plains*

20 October 2011

in the presence of


[REDACTED]
Deponent

[REDACTED]
~~Barrister/Solicitor/Justice of the Peace/~~
~~Commissioner for Declarations~~

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15 June 2011


Associate
Cooper Grace Ward
Lawyers
GPO Box 834
Brisbane 4001

Dear Mr 

**RACQ Insurance Limited (RACQ)
Provision of hydrology reports**

Thank you for your letters dated 12 May 2011 and 8 June 2011.

Your letters

You indicated that your client, RACQ, has a reasonable excuse for not making the full regional hydrologist reports available to both the Financial Ombudsman Service (FOS) and RACQ's insureds. You cited legal professional privilege (LPP) and privacy as the reasons for this.

Paragraph 7.2 of our Terms of Reference provides that a party must comply with FOS's request for information within the required timeframe, unless one of the specified conditions applies. There is nothing in your correspondence which would satisfy that part of paragraph 7.2. Paragraph 7.5 of the Terms of Reference outlines the consequences of a failure to comply with FOS's request.

Unless Special Circumstances apply to the material, then paragraph 8.4c) provides that where a party refuses to consent to providing material to the other party, FOS will not take that material into account when reaching its decision.

With the devastation experienced in Queensland by the recent floods, there is a wide expectation that FOS is accessible and in a position to provide its services for disputes that are unable to be resolved between eligible applicants and their insurance companies. In doing this, it does so by a transparent process and in line with the principles of procedural fairness.

In relation to an insurer's reliance on an expert opinion, it has been both FOS and its Predecessor Scheme's practice for an insurer to disclose the relevant report in an unaltered form. This is to enable both FOS and the other party to consider not only the opinion, but the context, comments and observations that led the expert to their conclusion.

FOS accepts that its Terms of Reference cannot compel a party to disclose information either to FOS or the other party if it is protected by LPP. However, FOS is also conscious of its role as an external dispute resolution scheme to fairly and independently resolve disputes.

While you have claimed LPP applies, it is apparent from the discussions with your client the principal reason for the hydrologist reports is the determination of liability in respect of the claims. We do not accept that LPP necessarily applies in these circumstances. Should you elect not to provide the full reports, then this may lead to an adverse inference being found. This is the same process as would apply before most decision making bodies, in particular, courts.

In so far as possible breaches of privacy requirements are concerned, this can be rectified by 'blacking out' personal information concerning third parties, in order to protect that party's privacy. There is no reason why this could not be applied with respect to those hydrologist reports where personal information about a third party is disclosed and has no bearing to the relevant dispute.

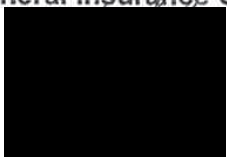
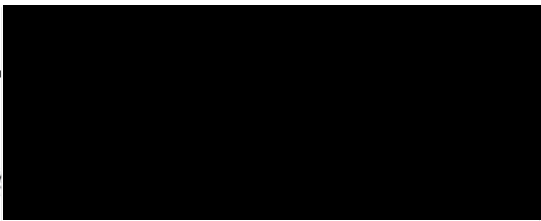
Next Step

As FOS is required to resolve disputes in a timely manner, I will progress the disputes involving RACQ in fourteen days time.

If RACQ does not provide the full version of the hydrologist reports, please note FOS will determine the disputes based on the information provided to it and in accordance with its normal practice.

Yours sincerely

John Price
General Insurance Ombudsman



Summary notes made by Graham Dale of meeting with John Price of FOS to discuss issues surrounding RACQI hydrology processes and release of regional hydrology reports

Date of meeting: 11:30am 4th July 2011

Date of notes: 4th July 2011

Location: Corporate offices, 127 Creek Street, Brisbane

Present: Bradley Heath, Graham Dale, John Price

- The meeting opened with a general discussion around the Queensland floods and associated issues for customers, the industry and FOS.
- John talked about the process that FOS were following, in particular a desire to be out in the field communicating with customers to understand their issues.
- Graham asked John how the FOS was coping with what he assumed to be a large influx of claims resulting from the Queensland floods. John confirmed that process etc were in place.
- Graham asked whether the normal FOS processes were being followed for the flood claims. John said that for the flood claims, given their size and ramifications etc that these would still proceed through the determination process, but given the influx of these there was a likelihood that a process of attempted conciliation would be used more often in respect of claims across the board such as disputes over quantum. This was to support timeliness of outcomes with the influx of work.
- John asked Graham how many claims RACQI had from Cyclone Yasi. Graham confirmed that RACQI had approximately 5,000 and there was a discussion as to the nature of these claims and the fact that the position for the industry could have been much worse had the cyclone crossed the coast in more populated areas. There was general discussion that there were not many disputes arising out of this in comparison to the Queensland floods. Graham expressed a view that the coverage issues were not comparable.
- After this general discussion Graham asked whether there was any particular structure that John wanted to follow in the meeting.
- John said that the issue we're here to talk about is RACQI's position of not releasing the regional hydrology reports and the issues associated with that. Graham agreed.
- John went on to state his position that;
 - the full regional hydrology reports must be released as a fundamental principle and the FOS would not move from this position.
 - it is up to RACQI whether the hydrologist provides a statement as well.
 - John talked about hydrologists and others being invited by the FOS to attend meetings etc held in the field.
 - the FOS and the applicant are entitled to these reports, they are fundamental to understanding all of the considerations and what was included and excluded in considerations.
 - other insurers were releasing their hydrology reports.
 - John suggested that RACQI would only have 5 or so of these. Graham confirmed that the number was closer to 15 - 18.
 - John went on to state that if RACQI goes down the track of not releasing the regional hydrology reports, FOS would assume that RACQI was not releasing these reports because information in the reports would be prejudicial to RACQI's position.

- Graham responded by talking to the specific provisions of the RACQI Household PDS and the fact that because of the flash flood/storm water cover provided the regional reports were specific to this PDS.
- Graham clarified that RACQI, from the outset anticipated a number of issues arising out of the Queensland flood events, including the possibility of class actions and put together a team of experts to assist with assessing claims in light of this. This included legal advisors, hydrologist, Loss Adjusters etc. and that the legal experts briefed the hydrologists to ensure information was received to enable them to provide legal advice to RACQI.
- Graham reaffirmed that in his view the regional hydrology reports were, and remain, subject to legal and professional privilege.
- There was a discussion around RACQI's concerns as to the FOS position as communicated by John. John advised that it was up to RACQI to understand whether it continued with a position of the regional reports being subject to legal professional privilege, but the FOS would treat matters as he had outlined.
- John stated that in the event that the customer raised any contradictory information to the hydrologists affidavit that in the absence of a regional hydrology report the FOS would be forced to accept what the customer says because it couldn't be sure that the affidavit was independent and not a 'hired gun' report which had been prepared without independence, i.e. on legal instruction.
- There was a general discussion regarding the possibility of class actions. John expressed a view that it was unlikely the hydrology would be the topic of class actions and more likely this would be point of sale, insurance contracts act etc. Bradley stated that he didn't disagree with this opinion but it was possible that hydrology could be, or form a part of any tactical aspect of class actions.
- John then made the point that there was already a 'systemic' issue for RACQI relating to the non provision of reports and that this and our communication with customers was a matter that would be referred to the FOS code compliance area to investigate systemic/breach of code.
- He had advised the code compliance area not to deal with issues such as these at this time, but to deal with them later once the priority had shifted from claims decisions.
- There was a general discussion around this issue of systemic problems and breach of code. Bradley talked about RACQI's market share and the fact that we were by far and away the insurer with the largest market share who was not paying for flood and that this would be reflected in the level of feedback being communicated to the FOS by customers. John said that the non release of the regional hydrology reports was central to these systemic issues as was communication because in respect of other insurers who released their reports, there were less issues.
- John said that RACQI might need to consider further what it needed to do in this area depending on it's stance on the regional hydrology reports. It could well be that the Code of Compliance committee formed a view that there was no systemic issue/breach, but RACQI might want to consider how it might release information to customers, legal aid etc i.e. website etc.
- Bradley asked John whether there was any way that John could see where RACQI's stance in relation to the legal/professional privilege of the reports could be maintained whilst satisfying

the FOS's requirements. John responded by reaffirming the points made earlier around the treatment of disputes by FOS when regional reports are not provided and that he could only give this feedback and it was up to RACQI as to what position it adopted.

- Graham stressed again that the regional hydrology reports were commissioned by the legal experts for the purposes of giving legal advice to RACQI and that they were also commissioned in contemplation of litigation on that basis. RACQI had been advised that the reports are clearly subject to legal/professional privilege.
- John stressed again that it was up to RACQI whether to adopt this position but in his view in there were also considerations for RACQI around issues such as reputational damage.
- In response to the raising of systemic issues by John, Graham raised the issue that if the reports were now released to FOS at this time effectively that put RACQI in a difficult position if it then received notice of a systemic issue, i.e. it would have already waived the legal professional privilege by releasing the reports to the FOS. Graham clarified this further by saying that his concern was that effectively by releasing the regional reports to the FOS, it compromised the position adopted with customers etc up to this point that the reports were legally privileged. In response John suggested that this probably wasn't a concern in his view as RACQI would have had a legitimate belief that it had provided adequate information to customers etc up to this time.
- Graham asked that if RACQI, after this meeting, in talking to it's lawyers, reached a position where the regional hydrology reports needed to be released to the FOS could it choose to do so either by releasing them all at one time to FOS, i.e. independently of each submission or could we alternatively provide as part of the submission process. John expressed a view that either would be appropriate.
- The meeting finished with an understanding that RACQI would consider further in conjunction with it's legal advisors and revert.