

Natural Disaster Insurance Review

Submission by
the Financial Ombudsman Service Limited

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Contents

1	Introduction	3
1.1	<i>Information about FOS</i>	3
2	Submission	5
2.1	<i>Summary</i>	5
2.2	<i>Chapter 4 – A high-risk flood insurance system</i>	5
2.3	<i>Chapter 5 – Flood cover for contents insurance</i>	5
2.4	<i>Chapter 6 – Flood cover for strata title and other residential property</i>	6
2.5	Chapter 9 - Measuring flood risk	6
2.6	<i>Chapter 11 – Non-insurance of homes: should home insurance be compulsory?</i>	7
2.7	<i>Chapter 12 – Under-insurance of homes</i>	7
2.8	Chapter 13 - Non Insurance and under insurance of contents	8
2.9	<i>Chapter 15 – Consumer awareness of risk and insurance</i>	9
2.10	<i>Chapter 16 – Processing of claims</i>	10
2.11	<i>Chapter 17 – Resolution of claims disputes</i>	11

1 Introduction

This is the submission by the Financial Ombudsman Service Limited (“FOS”) in response to the Natural Disaster Insurance Review paper released by Treasury in June 2011 (“the Issues Paper”).

This submission draws on the experience of FOS and its predecessors in the resolution of disputes relating to financial services. The submission has been prepared by the office of FOS and does not necessarily represent the views of the FOS Board of Directors.

1.1 Information about FOS

FOS commenced operations on 1 July 2008 and provides an independent, external dispute resolution (“EDR”) scheme approved by the Australian Securities and Investments Commission (“ASIC”).

FOS was formed through the consolidation of three predecessors:

- The Banking and Financial Services Ombudsman (“BFSO”);
- The Financial Industry Complaints Service (“FICS”); and
- The Insurance Ombudsman Service (“IOS”).

On 1 January 2009, two other schemes joined FOS:

- The Credit Union Dispute Resolution Centre (“CUDRC”); and
- Insurance Brokers Disputes Limited (“IBD”)

Membership of FOS is open to any financial services provider (“FSP”) carrying on business in Australia, including providers not required to join a dispute resolution scheme approved by ASIC. Replacing the predecessor schemes, FOS provides free, fair and accessible dispute resolution for consumers unable to resolve disputes with FSPs that are members of FOS. FOS members include:

- Australian credit licensees
- Australian credit representatives
- credit unions
- mortgage brokers
- payment systems operators
- banks and their related corporations carrying on business in Australia
- fund managers
- friendly societies
- building societies
- stockbrokers
- financial planners
- pooled superannuation trusts
- timeshare operators
- general insurers

- life insurers
- re-insurers
- underwriting agents
- insurance brokers.

Through its predecessors, FOS has over 20 years worth of experience in providing EDR services in the financial services industry and it is estimated that FOS covers up to 80% of financial services disputes in Australia.

As well as its functions in relation to EDR, FOS has responsibilities to identify and resolve systemic issues and serious misconduct that arise from the conduct of its members. FOS has further obligations to report to ASIC on its activities.

FOS is a not-for-profit organisation funded by its members. FOS is governed by a board of directors comprised of an independent Chair and equal numbers of consumer and industry directors.

FOS also monitors and conducts audits of insurance companies who are signatories to The General Insurance Code of Practice (the Code). In this role FOS investigates breaches of the Code, systemic issues and misconduct by insurers. The Code Manager reports to the Code Compliance Committee which has an independent Chair as well as one consumer representative and one industry representative.

In compliance with RG139 FOS is also obliged to report systemic breaches to ASIC

2 Submission

2.1 Summary

As an independent body, FOS does not seek to advocate for consumer rights, nor advise industry on the best way to approach any given situation. This submission has been drafted to inform the consultation engendered by the Issues Paper and to share the experience of FOS where it is relevant to the questions asked.

As a general position FOS has found the major issue in disputes to be the confusion over the extent of cover due to the various definitions of flood/storm.

Again as a general proposition, the only way this type of dispute can be entirely overcome would be to have automatic flood cover.

FOS recognises the difficulties associated with achieving automatic flood cover in particular the affordability/availability within the market. FOS is also concerned that any proposition that may, whilst improving the level of cover available, increase insurance premiums. This may have unintended consequences in particular to those with limited disposable income. If premiums rise many consumers may not be able to afford any cover, this may cause an increase in the level of non insurance. Any proposed changes will need to consider low income earners as a very vulnerable group in society.

FOS is not in a position to provide a response to some of the questions set out in the Issues Paper. Where a question has been omitted from this submission, it should be taken that FOS has no submission to make in respect of that issue.

2.2 Chapter 4 – A high-risk flood insurance system

2.2.1 How might the Flood Insurance Pool be structured regarding its legal existence, capital, financial modus operandi and governance?

Regardless of how the Flood Insurance Pool is funded, it should be a legal entity in its own right, operate on a not-for-profit basis, and should have a governance structure independent of industry.

2.3 Chapter 5 – Flood cover for contents insurance

2.3.1 If the Automatic Flood Cover model or the Automatic Flood Cover with Opt Out model is introduced for home insurance, to what extent should the flood cover in home policies be reflected in contents insurance, for each of owner occupiers and renters?

Given the commonplace bundling of home and contents insurance, as well as the close association between claims on these types of policies, any proposals regarding flood cover in relation to one, should be made in relation to the other.

2.3.2 What practical issues could arise if home insurance policies were required to include Automatic Flood Cover but contents insurance policies were not required to include Automatic Flood Cover?

- Failure to include contents insurance as part of automatic flood cover will lead to confusion as to the extent of cover in bundled household building-contents policies.
- The level of disputation will remain high as most buildings affected by flood will suffer contents damage.
- Contents damage can be a significant loss to an individual and in particular for low income earners who are more likely to be tenants. The lack of flood cover covering contents could therefore disadvantage tenants and low income earners.
- Tenants are less likely to have knowledge of flood risks in a particular area. Without adequate knowledge, the risk of not having adequate insurance is increased.

2.4 Chapter 6 – Flood cover for strata title and other residential property

2.4.1 If the Automatic Flood Cover model or the Automatic Flood Cover with Opt Out model is introduced for homes, how far should the arrangements apply?

Any derivation from standard automatic flood cover or automatic cover with opt out is likely to cause confusion. This will lead to levels of disputation, in the event of a flood event effecting either strata title property, retirement villages, caravans, mobile homes or company properties.

FOS acknowledges that these products differ from the average general insurance product, and the relationship between the body corporate and the insurer are often a different relationship to that between an insurer and a property owner. In the event automatic flood cover model or the automatic flood cover opt out model was extended to cover strata title property, retirement villages, caravans, mobile homes or company properties, this would avoid potential confusion for property owners.

Caravans and mobile homes are a different risk as noted in 6.14 of the Natural Disaster Insurance Review. Many caravan sights are located in high risk areas. Furthermore caravans and mobile homes may well be the permanent residence of an individual and the inability to obtain adequate cover may have a significant impact on these individuals.

2.5 Chapter 9 – Measuring flood risk

The availability of proper flood mapping has a broader impact than that imposed on insurers and councils. The lack of adequate flood mapping has the following impacts:

- it affects the ability of an insurer to properly price the insurance product

- it reduces the ability of the insurer and consumer to measure risk, which can lead to a failure by parties to understand the level of risk. Without properly understanding the level of risk, the ability to mitigate risk is reduced
- it affects the ability of consumers, councils and government to plan and implement mitigation strategies, development strategies and building codes
- it affects consumers' ability to determine appropriate resolution after a flood event including whether to rebuild at a new situation, replace the dwelling or cash settle

These impacts can create increased levels of frustration for consumers when impacted by floods.

2.6 Chapter 11 – Non-insurance of homes: should home insurance be compulsory?

2.5.1 Given the high rates of voluntary take up of home insurance, the historical right not to insure and the significant changes to the legislative framework and administrative infrastructure that would be required, is there nevertheless a case for making home insurance compulsory?

According to the Issues Paper, up to 4% owner occupied homes remain uninsured. The paper has not identified the reasons for non-insurance of homes in Australia although suggested relief funds in times of natural disaster may offer disincentives to buy insurance.

FOS considers further information is required to determine why individuals choose not to insure, but suspects the reason may well have to do with demographics such as location, costs, financial stability, etc.

Making home insurance compulsory may have the unintended consequence of increasing financial stress for those in financial difficulty in particular for those in high risk/flood areas.

Further information is required before this can be addressed.

2.7 Chapter 12 – Under-insurance of homes

2.7.1 To what extent would the substitution of replacement cover for sum insured cover eliminate the under-insurance of homes?

FOS is of the view replacement cover acts to limit the level of dispute and effectively eliminates issues concerning under-insurance. FOS is in favour of replacement cover being available under all policies. This issue is with the insurers' ability to properly assess the risk and to price the policies appropriately. There is a risk replacement cover will increase premiums and in doing so impact on the financially disadvantaged.

2.7.2 What arrangements could be put in place to minimise the possibility of disputes if a cash settlement is offered under a replacement cover policy?

Clause 4.5 of the General Insurance Code gives a six month cooling off period to a consumer who has had a property claim resulting from a catastrophe or a disaster that was finalised within that one month of that event. Insofar as a claim might be cash settled within that one month there would be a review open under the code and an opportunity to review the decision.

The timing of a cash settlement can be most important to help alleviate the pressures on a particular individual. The Acceptance of that cash settlement however, can in some circumstances provide only temporary relief from the problems faced by the individual consumer. The earlier the cash settlement, the less likely it is that the cash settlement is adequate to meet the costs of replacement of a dwelling in the event a consumer chooses to rebuild in the disaster affected area at a later date.

FOS can currently consider disputes relating to cash settlements. If cash settlements could only be made by agreement between the parties and the Code strengthened to provide a 6 month review period (extend beyond the one month time limit), in the event of building code or other issues arising this would limit disputations.

2.7.3 What factors should be considered in determining whether homeowners should have the right to reject a cash settlement in favour of their insurer arranging rebuilding or repairing?

Factors to be considered include:

- cash settlements by agreement are less likely to result in a dispute, cash settlements are usually at the discretion of the insurer.
- insurance repairs authorised by an insurer generally provide a lifetime guarantee
- insurers determining to rebuild or repair will cover all relevant costs. A cash settlement may not be adequate to meet the changes to building regulations which occur regularly after a disaster event
- a cash settlement may not identify all the costs associated with rebuilding or repairing.

2.8 Chapter 13 – Non-insurance and under insurance of contents

Issues regarding under insurance of contents arise within FOS from time to time. Most disputes involve specified items and replacement costs rather than total amount insured.

With natural disasters such as flood/bushfires, etc. the likelihood of a total loss is increased and consequently the issue of under insurance of contents is highlighted.

Again the impact of under insurance in these circumstances is likely to impact heavily on tenants and those with financial difficulty.

The failure to adequately insure adds to the burden on government and not-for profit organisations to provide assistance to the individuals affected and can impact on the broader community. If, because of risk the premiums are too high, the take up of insurance is likely to reduce. To avoid this, premium discounts/subsidies should be offered in high risk areas as part of risk mitigation for the community.

2.9 Chapter 15 – Consumer awareness of risk and insurance

It is FOS's experience that many consumers impacted by the recent floods have complained:

- a. that they did not know they were in a flood zone
- b. that their area had never been subject to flooding (many stated they were not flooded in 1974)
- c. they were unaware of the possibility of a flood or the risk of damage associated with flood.

Many have also expressed that they were unaware that their policy did not cover the risk of flood and that they were unaware despite having received a Product Disclosure Statement (PDS). There were those who also were not aware of their extent of cover as the PDS did not clearly inform them as to the extent of cover due to the definition that applied to flood as against storm.

A key facts statement in the front of the PDS as suggested by the Federal Government as well as an improved Certificate of Insurance schedule would be a significant improvement to the current position.

FOS has found that the level of disputes where consumers have been provided advice through an intermediary, either a broker or authorised representative, is far less than the level of disputes where policies have been taken out direct with an insurer.

FOS does not have information of the advice provided by the insurance broker or authorised representative. We expect it would relate to the adequacy and extent of cover. There is no reason to believe that if personal advice, which takes into account the individual circumstances and assessment of risk, would be a disadvantage to consumers.

To limit the possibility of disputes on the advice given, a Statement of Advice would need to be provided to the consumer giving the basis of the advice. This would assist the consumer to make an informed decision as to the level of cover required.

Scaled advice, if it was directed at whether flood/natural disaster cover was required or not, would also provide improved knowledge and improve the consumer's awareness of risk.

Whilst a standard definition of flood would assist in informing consumers as to the nature of the cover, the definition of flood would not necessarily resolve the level of

disputation as disputes would continue to exist as to whether the event was flood or storm.

2.10 Chapter 16 – Processing of claims

2.10.1 What have been the causes of delays in processing claims other than delays caused by the need to determine whether damage was caused by storm or flood?

The overall scope and scale of the Queensland floods has stretched all resources. The availability of assesses/adjusters, accessibility of sites, the availability of trades and the remoteness of some locations have all contributed to delays in processing of claims. There were also concurrent disaster events in Victoria, Western Australia and in Christchurch, New Zealand.

2.10.2 In cases of delayed claims processing and settlement, how adequate is the communication between insurers and consumers?

FOS is of the view that communication and in particular effective communication between the consumer and insurer can limit the level of dispute.

The General Insurance Code of Practice at paragraph 3 deals with insurance claims handling under the Code. The Code provides a time frame within which an insurer should deal with claim and a standard of conduct for claims handling. The Code however, acknowledges that responding to catastrophes and disasters can result in a large number of claims and acknowledges that it may not be possible to meet all standards of the Code following a catastrophe or disaster.

Unfortunately during times of catastrophe/disaster, consumers are at their most vulnerable. FOS's experience indicates early and effective communication reduces the level of disputation. The communication in major events such as the Victorian Hail storm and Western Australian Hail storm, where there was a combined total of approximately 300,000 claims seemed very effective. Conversely FOS has found that the communication during the Queensland and Victorian floods has not been as effective for some insurers. Communication has been impacted by the dislocation caused in the event and the delays in determining liability in particular where the policy did not provide flood cover.

In FOS's experience, those insurers who have been pro-active, who have either contacted potential claimants or have kept consumers informed as to the progress of their claim on a regular basis are less likely to have disputes. In circumstances where the policy does not cover the event, those insurers who have clearly informed consumers of the extent of cover, how the claims were being processed and have responded to various issues raised by the consumer are less likely to have complaints.

Communication during a catastrophe/natural disaster is not only between the consumer and insurer but it is also affected by media reports, Government announcements and often misinformation. It is most important in FOS's view as part

of any communication strategy or catastrophe recovery plan that there be a communication plan in place to ensure affected communities have access to support on the ground, that there are early community meetings and then on-going support provided through the Insurance Council, consumer organisations and FOS to assist people and provide initial advice. Where there has been a breakdown in communication between the insurer and the insured, these meetings often act to facilitate further communication between the parties.

From FOS's experience, if communication can be restored between the consumer and insurer, this often leads to the resolution of the dispute in a timely and speedy manner.

Insofar as the time limit for a decision to be made on insurance claims, the nature of the natural disaster impacts on the ability of an insurer to make a decision. It is not always possible for an insurer to have all information available to it within a timeframe. This becomes particularly relevant in events such as the Queensland floods where not all policies cover the event and expert evidence (hydrology) may be required. Currently RG165 provides a timeframe for an insurer to make a final decision on the dispute in the event of a complaint being made. That timeframe may not always be able to be complied with in the event of difficulty obtaining appropriate information. Providing an insurer communicates to a consumer the cause of the delay and keeps them informed as to progress then disputes can be limited.

2.11 Chapter 17 – Resolution of claims disputes

Should there be a mandatory time limit for insurers to respond to disputes following a natural disaster and, if so, how long should it be and should it be regulated through the industry Code of Practice or legislated?

ASIC's Regulatory Guide 165 imposed the 45 day limitation period to provide a final decision where a complaint is lodged. The Regulatory Guide acknowledges the possibility that that timeframe be extended.

To establish a mandatory timeframe given the difficulties that may be encountered, in particular where there is a flood event and the policy does not necessarily cover the event, may cause many difficulties. Any mandatory time limit would need to take into account the need in some circumstances to access specialists or expert opinion to assist in the Determination of a claim. Depending on the nature of the event, an expert opinion may not be readily available as being found with the Queensland floods.

Section 4 of the General Insurance Code of Practice sets out standards that apply to catastrophes and disasters resulting in a large number of claims. It recognises that participating companies may be unable to meet all standards of the Code following a catastrophe of disaster, due to the large number of claims. Some of the requirements in section 4 are noted below.

- clause 4.2 requires companies to respond to a catastrophes and disasters in a fast, professional and practical way and in a compassionate manner

- clause 4.4 requires the companies to establish their own internal processes for responding to a catastrophes and disasters
- clause 4.5 provides that where a consumer has a property claim resulting from a catastrophe or disaster and a participating company has finalised the claim within one month of the catastrophe or disaster, the consumer can request a review of their claim if they think the assessment of their loss was not complete or accurate, even though they may have signed a release. The consumer had six months from the finalisation of the claim to request a review. In addition, the company has to inform the consumer of:
 - their review entitlement when the claim is finalised
 - the company's complaints handling procedures.
- the risk in imposing a mandatory time limit is that it would by its nature need to take into account the difficulties faced by the insurer and may impose a generous time limit that in turn becomes the defacto time for Determination of claims
- delays by some insurers in exchanging information in particular hydrologists reports, or requiring multiple reports prior to making a claim decision has caused significant disputes between consumer, advisors and insurers. The provision of information relied upon need to be strengthened to ensure all information relied upon is exchanged with a consumer so the consumer/advisor can make an informed decision as to whether to dispute a claim decision or not.

2.11.1 Is there a case for improving monitoring and transparency of insurers' internal dispute resolution processes?

EDR Lodgements compared with insurance claims

Disaster Event	Number of insurance claims made 24/6/11*	Number of disputes lodged 30/6/11	Lodgements as percentage of claims
SW/SE Queensland Flooding	Not available	21	
Victorian Hail Storm	135,000	90	0.066
WA Hail Storm	165,000	43	0.026
Queensland Flooding	56,200	368	0.655
Victorian Flooding	7,500	44	0.587
Cyclone Yasi	68,300	42	0.061
Victorian Storms	48,000	56	0.117
WA Bushfires	410	0	0

*Source: "Current Disaster Statistics at 24 June 2011" at insurancecouncil.com.au

The table shows, for each Disaster Event, the number of insurance claims made as at 24 June 2011 and the number of disputes lodged with FOS as at 30 June 2011. It indicates that, as a percentage of the insurance claims, the number of disputes lodged with FOS is high for floods.

Factors that in our view help to explain this are as follows.

- insurance provided by some insurers excludes flood cover
- when insurers excluding flood cover have denied claims for flood Disaster Events, their decisions have raised complex issues such as:
 - whether flooding was caused by a flood or storm
 - whether sections 35 and 37 of the *Insurance Contracts Act* were satisfied
 - what representations were made at the point of sale and what their ramifications are.
- insurers excluding flood cover have needed to obtain hydrology reports before deciding whether to accept or deny claims. Delays in obtaining the reports have caused delays in claims processing. Where there are delays the level of

dispute increases. Where there are delays then the level of disputes increases.

While FOS is responsible for Code monitoring it also gathers and publishes statistics from insurers on their IDR performance. The latest Annual Review can be found on the FOS website under Publications and headed "General insurance Code of Practice: Overview of the Year 2009/2010".

2.11.2 What, if any, changes are needed to the responsibilities of insurers and policyholders during the dispute resolution process?

It is most important that there be a full exchange of information in the dispute resolution process.

Both parties should be responsible to provide all information available to them.

In many circumstances and in particular where there has been a natural disaster, a consumer is unable to provide information as this has been lost.

FOS has been informed of occasions where insurers have been insensitive to the loss of information and in particular where individuals have been asked to provide full itemised lists of property lost, including receipts, full financial records and photographs.

In most circumstances the insurance industry has acted responsibly and compassionately in dealing with these matters. A set of protocols developed in consultation between the Insurance Council, insurance industry, consumer movement and FOS, with respect to the exchange of information and proof of loss where there is a natural disaster, may assist in limiting some of the disputes that arise.

2.11.3 How can policyholders' access to information during the dispute resolution process be improved with regard to reasons for decisions, documents relied upon in decision-making and independent legal advice?

ASIC regulatory guide 165 provides where an insurer provides a final response they must notify the consumer in writing of:

- a) the final outcome of the complaint
- b) the right to take their complaint or dispute to EDR
- c) see the name and contact details of the relevant EDR scheme.

RG 165 does not refer to the provision of documentation but seeks to promote transparency, fairness, honesty and professionalism as part of the process. The general insurance industry Code of Practice under chapter 6.1.4 provides the insurer will provide access to the insured of all the information that has been relied upon in accessing the complaint and an opportunity to correct any mistakes or inaccuracies.

The Code of Practice itself does not commit to a full exchange of all material and requires the consumer to request access to the documentation or information.

Our Terms of Reference require the exchange of information between the parties and in the event that a party to a dispute refuses to consent to the exchange of information, FOS is not entitled to use that information to reach a decision adverse to the party to whom confidential information is denied, unless FOS has determined that special circumstances apply.

Under the Terms of Reference FOS may require a party to a dispute to provide to or procure for FOS any information that FOS considers necessary, the party must comply with that request within the time frame specified by FOS, except in limited circumstances.

As a general rule with the Queensland floods, the insurers have provided early access to the information and in particular hydrology information relied upon. Where this information has not been provided this has led to a considerable level of complaints.

The strengthening of either RG 165 and or the Code of Practice may assist in insuring the earlier exchange of material, prior to the matter being referred to FOS.

Our Terms of Reference limit the disputes that we can consider and impose a cap on the compensation that we can award. These restrictions operate as barriers to participation in EDR for consumers. We note in this context that:

- Certain disputes relating to small business insurance products, such as loss of profit and industrial special risks products, are excluded from our jurisdiction. This may exclude a significant number of disputes.¹
- Although we can consider a dispute involving a claim for up to \$500,000, the compensation (excluding any amount for costs and interest) that we can award per claim is capped at \$280,000. Replacement costs for most houses would greatly exceed that cap.²

The factors referred to below may also prevent consumers from participating in dispute resolution through FOS.

- A consumer may suffer “complaint fatigue” where they find the complaint process so daunting that they cannot pursue their complaint by referring it to FOS. Some consumers find it extremely difficult to effectively express dissatisfaction in an insurer’s decision and provide information to counter an insurer’s arguments.
- Some consumers are not aware of their rights to use our services. The proportion of disputes lodged by consumers from rural areas and smaller

¹ See paragraph 4.3 of our Terms of Reference and the definition of “Small Business Insurance Product” in paragraph 14.1.

² See paragraph 9.7 of our Terms of Reference.

States is somewhat low given their populations. From our contact with these consumers, we gather that some of them feel isolated and do not know how to proceed in disputes.

- Legal practitioners do not have sufficient awareness of FOS and the services that it provides.

2.11.4 Should consumers have access to independent legal advice in rejected insurance claims, particularly in natural disasters. If so from whom and how should it be funded.

Early access to community information forums and one on one meetings with representatives of the insurance industry, Legal Aid services and or community legal centres (legal services) and FOS is most important for consumers affected by natural disasters.

It is FOS's view that the provision of free legal advice should be viewed as part of an overall package of assistance available to consumers, in particular those affected by natural disasters benefit greatly from the broad advice including legal advice that is provided through community forums, one on one meetings and other community services. Where the assistance encourages the exchange of information and facilitates discussion and communication between the consumer and insurer at an early stage, potential disputes may be avoided.

FOS provides a free service to consumers. Our processes are inquisitorial and we provide information and assistance to consumer (and if requested, the representative) to help identify the issues in dispute and articulate those issues. Most consumers are not represented before FOS. While consumers are not disadvantaged if not represented, legal representation will often assist in the identification of the issues in dispute.

The access to free legal advice is part of the overall package of assistance that can and should be provided, in particular where the insurance claim is rejected.

Of 870 disputes lodged with FOS, dealing with the number of natural disasters, 15% have been referred by Legal Aid, a free legal service and or solicitor. The majority of disputes lodged with FOS are lodged as a result of the reference to the EDR scheme as part of the insurer's final decision letter.

The number of referrals from legal services/community services as against the number of consumers they represent is relatively low. The reason for delaying the referral of a dispute to EDR or not accessing EDR can be many including:

1. active negotiation to resolve the matter with the FSP
2. client not providing instructions

3. efforts to obtain information about the dispute being delayed by the failure of the member to exchange information
4. determining not to pursue a dispute on merit
5. lack of adequate resources to deal with the number of cases, particularly relevant with the Queensland flood
6. lack of experience with insurance matters.

Experience with the Queensland floods confirms the need to ensure the community and legal services are adequately funded to respond to the demand. If they are not adequately funded/resourced they can cause further delay and frustration.



John Price
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21 July 2011