

The FOS Approach to Insurance Broker Disputes

1	At a glance	2
1.1	Scope	2
1.2	Summary	2
2	In detail	3
2.1	Rationale behind the approach	3
2.2	Establishing a loss	4
3	Context	7
3.1	Case studies	7
3.2	References	8

We have created a series of FOS Approach documents, such as this one, to help consumers and financial services providers better understand how we reach decisions about key issues.

These documents explain the way we approach some common issues and dispute types that we see at FOS. However, it is important to understand that each dispute that comes to us is unique, so this information is a guide only. No determination (decision) can be seen as a precedent for future cases, and no FOS Approach document can cover everything you might want to know about key issues.

1 At a glance

1.1 Scope

Disputes are often lodged with FOS where a consumer alleges that the general insurance broker (financial services provider or FSP) failed to arrange adequate insurance or fully informed them of the terms of cover.

This paper will explain how FOS approaches such disputes and will be useful for:

- FSPs who provide general insuring brokering services
- consumers and consumer representatives who have a dispute involving a general insurance broker
- anyone else who wants to understand how FOS approaches this issue.

1.2 Summary

An insurance broker enters into a professional relationship with a consumer and therefore has a duty of care when acting on behalf of a consumer.

In determining whether the FSP has met its duty of care, FOS considers if the FSP has:

- appropriate practices and processes in place to fully canvas and record the consumer's insurance needs
- undertaken reasonable efforts to arrange a policy suitable to the consumer's needs
- appropriately informed the consumer of any inability to arrange the cover sought or of a relevant exclusion that impacts their insurance needs
- provided advice to the consumer to ensure they are able to make an informed decision about their insurance needs
- established the terms of agreement between the parties.

2 In detail

2.1 Rationale behind the approach

What are the broker's duties and obligations to a client?

Legal principles require insurance brokers to exercise reasonable care and skill in the performance of their duties. The relevant standard is that expected of a competent and experienced insurance broker. Brokers are held up to the same standard as any professional person.

It is generally accepted that when a broker arranges an insurance policy for a consumer, it must ensure the policy covers the risk necessary to the consumer's disclosed or **ascertained** needs.

The broker's duty is to undertake reasonable inquiries to ascertain the consumer's needs. In disputes lodged with FOS, we will consider if the broker, having undertaken reasonable inquiries, would have ascertained that the matter in question was relevant to the consumer.

Is the policy adequate to meet the consumer's needs?

The broker should ensure that the cover is sufficient to meet the applicant's needs. If an exclusion impacts consumers' disclosed or ascertained needs or the sum insured is less than required, the broker is required to properly inform the client of this.

This does not mean a broker must explain all exclusions.

FOS accepts this approach to be reasonable and fair in all the circumstances because it would be impractical and unreasonable for brokers to go through all exclusions, conditions or limitations of a policy.

Certain exclusions are inherently obvious and/or almost always imposed on certain types of policies. For example, in home building policies, exclusion clauses for damage caused by wear and tear or gradual deterioration are essentially universal.

Therefore, the broker would not be required to draw attention to them unless the consumer specifically disclosed a need for this cover.

Has the FSP appropriately communicated the exception?

In general, the FSP must satisfy FOS that reasonable efforts were undertaken to ascertain the consumer's needs and specifically inform the consumer of a relevant policy exclusion or exception. What is reasonable will depend on the facts and circumstances of each individual case.

Simply sending a policy containing the relevant exclusion/exception without drawing this to the attention of the applicant is unlikely to be sufficient.

In contrast, setting out the exclusion in the first page of a policy summary could be acceptable. However, this may be insufficient if the evidence shows that:

- the schedule was sent to the wrong address
- the FSP ought to have known the consumer was unlikely to read anything sent in writing.

If the broker informed the consumer verbally and in writing of the relevant exclusion, and had documentation to substantiate this (ie file notes, proof of dispatch of correspondence sent), that would be sufficient in most cases.

2.2 Establishing a loss

What does FOS consider?

If the FSP failed to inform a consumer of a relevant policy exclusion, compensation will not always be awarded.

FOS must still consider whether the FSP's failure caused the consumer to suffer the loss being sought.

This loss is assessed as the amount necessary to restore the consumer to the position they would have been in if the failure had not occurred.

If the consumer is found to be no worse off than if the failure had not occurred, no compensation would be awarded.

How does this work in practice?

FOS will identify the probable series of events that would have occurred if the FSP's failure (or breach) had not occurred. Following this analysis, FOS will compare whether this would have left the consumer in a more favourable position financially.

If this is the case, FOS will award an appropriate remedy that will, as much as possible, restore the consumer to the position they should have been in.

This is illustrated in the following examples:

Example	Outcome
<p>The FSP failed to clearly inform a consumer that their policy did not cover flood in circumstances when this was relevant to the consumer's needs.</p> <p>The evidence established the FSP could have identified an insurer who provided flood cover and the consumer would have purchased this policy.</p>	<p>Financial loss would be awarded.</p> <p>Compensation would be based on what was payable on the policy the consumer would have purchased, after deducting any excesses and additional premiums.</p>

Example	Outcome
<p>The FSP failed to inform the consumer that the policy did not cover his business property for burglary.</p> <p>However, the evidence established that the cost of arranging this cover was prohibitively high due to numerous burglaries in the past.</p>	<p>Price was a significant factor in the consumer's insurance needs and he consistently instructed the FSP to arrange cover at minimal cost.</p> <p>Given this, FOS would not be satisfied the consumer would have paid the additional premium necessary to arrange the burglary cover.</p> <p>Therefore, the consumer did not suffer any loss due to the FSP's breach.</p>

How does FOS approach issues regarding whether cover was available for the relevant risk?

This issue can often arise in this type of dispute. In such cases, FOS will generally adopt the following approach:

Scenario	Approach
<p>The cover is relatively uncontroversial (eg specified limits in a contents policy).</p>	<p>FOS will readily infer such cover was available.</p>
<p>The cover could have been conceivably available in the insurance market (eg flood cover for a small business).</p>	<p>FOS will accept such cover was available if:</p> <ul style="list-style-type: none"> • FOS accepted the FSP breached its duty and • The FSP led no evidence to support the fact such cover was not available. <p>This is consistent with FOS's requirement to offer a fair and efficient process as:</p> <ul style="list-style-type: none"> • Such information is much more difficult for a consumer to obtain, and • The FSP ought to submit such information when a defence that the cover was not available is argued or should have been argued
<p>It is apparent such cover was not available (eg wear and tear in a home insurance policy).</p>	<p>FOS will not accept such cover was available unless evidence was led to the contrary.</p>

Financial Ombudsman Service

FOS considers this approach and methodology is consistent with its obligation to deal with disputes in a cooperative, efficient and timely matter. It is also consistent with its paramount duty to decide disputes that are fair in all the circumstances after having regard to:

- legal principles
- applicable industry codes of practice (such as the Insurance Brokers Code of Practice)
- good industry practice
- previous FOS determinations (although it is not bound by those).

What information would FOS generally need?

It is important that a broker can provide clear details of instructions obtained from a consumer and any discussion held.

Brokers should ensure that clear and precise records are kept of their dealings so that this information can be supplied if requested.

When considering these types of disputes, FOS would generally require the following information from the parties, particularly the FSP:

1. copy of the terms of engagement
2. copy of any and all financial services guides provided
3. copy of any fact find/needs analysis form
4. copy of correspondence between the consumer and FSP
5. copy of file notes, telephone conversations, instructions, emails, etc
6. copy of any notes of discussions with relevant insurers as to available cover
7. copy of research as to availability of cover
8. copy of policy schedules/certificates of insurance, policy summaries, Product Disclosure Statement
9. particulars of claim.

3 Context

3.1 Case studies

Case 1: Flood cover for a medical practitioner

The applicant is a medical practitioner providing business services through a company and is a long-standing client of the FSP.

In January 2008, the applicant's business was relocating to a new address. As a result, the applicant contacted the FSP to ensure appropriate insurance cover was arranged. In addition, the applicant requested flood cover "if not too expensive".

The FSP arranged insurance cover for the new address. Although it appeared the FSP made some inquiries about flood cover with insurer X, this was not arranged.

During the renewal period of 2010-11, the applicant's business premises sustained damage as a result of water inundation. X denied the claim due to "flood". Neither party has disputed X's decision.

FOS found that because the FSP was specifically instructed to arrange flood cover, the FSP was obliged to give effect to those instructions and if it could not do so, to inform the applicant.

The fact that the FSP supplied a copy of the policy was insufficient because the flood exclusion was a relevant policy exception and the method of communication was not appropriate in the circumstances.

Further, FOS was satisfied flood cover could have been arranged for a reasonable price if the FSP had undertaken reasonable inquiries. Therefore, the FSP was liable for the applicant's losses, subject to any deductions for additional premiums and excesses that would have been applicable in the alternative policy.

Case 2: Agreed value v market value

An applicant insured a pleasure craft with the help of a broker (the FSP). The policy was effective from 5 January 2005. The applicant alleged that they instructed the FSP to arrange an agreed value policy of \$170,000 which they sought to be amended to \$200,000 in December 2006.

The FSP disputed it received these instructions.

The policy that was arranged insured the vessel for market value. This policy was continually renewed up to 2009-10. Following the 2009-10 renewal, the vessel was involved in an accident. It was assessed as a total loss.

The insurer settled the claim for \$140,000 based on the vessel's pre-accident value. The applicant accepted this offer and then pursued a dispute against the FSP for \$60,000. The dispute was based on the FSP's failure to arrange an agreed value policy of \$200,000.

Based on the available information, it was accepted that:

- the applicant’s insurer and another insurer had a fairly substantial share of the pleasure craft insurance market
- both insurers would have insured the vessel for an agreed value only if a written valuation was provided in support.

After reviewing all the material, FOS found that even if the FSP failed to notify the applicant that the policy did not insure the vessel for an agreed value, the applicant did not suffer loss as a result.

This was because the applicant could not satisfy FOS that they would have been in a position to arrange an agreed value policy of \$200,000 at the relevant time given that:

- the market value of the vessel at the time was only \$140,000
- there was no evidence that the applicant would have been able to source a valuation for \$200,000 at the 2007 renewal, or that this agreed value would have been maintained at the relevant renewal. In particular, given the market value of the vessel, it was improbable that a written valuation of \$200,000 could have been sourced
- without a written valuation, the insurers the applicant would have used would have been prepared to offer only a market value policy, which is the policy available at the time.

3.2 References

Definitions

Term	Definition
Consumer	individual or small business that has lodged a dispute with FOS
FSP	financial services provider (a business that has chosen FOS as its external dispute resolution scheme)
FOS	Financial Ombudsman Service Australia

Useful links

Document	Link
Terms of Reference	www.fos.org.au/tor
Austlii	Austlii is a free resource that contains a full extract of most of the judgments issued in Australia over the past 20 years: www.austlii.edu.au

Document	Link
ASIC Regulatory Guides	These give practical guidance on various topics governed by ASIC and how ASIC exercises specific powers and interprets the law. They are available here: http://bit.ly/28ZRevD
Code of Practice	Insurance Brokers Code of Practice is an agreement between the National Insurance Brokers Association of Australia (NIBA) and its members. This sets out the minimum standards that consumers can expect from those brokers who are signatories to the Code: http://bit.ly/29iOA4M
Section 912A	Sets out the general obligations an FSP must comply with under the Corporations Act 2011 regarding their financial services licence. It can be accessed here: http://bit.ly/2903MFv