

The AFCA Approach to proof of despatch

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|----------|---|----------|
| 1 | At a glance | 2 |
| 1.1 | Scope | 2 |
| 1.2 | Who should read this document? | 2 |
| 1.3 | Summary | 2 |
| 2 | In detail | 2 |
| 2.1 | Insurer obligations under the <i>Insurance Contracts Act 1984</i> | 2 |
| 2.2 | Providing documents by email – obligations under s 72A of the Act | 3 |
| 2.3 | What information does AFCA need? | 4 |
| 3 | References | 5 |
| | Appendix A – FOS Circular, Issue 3: Establishing that documents have been sent (July 2010) | 7 |

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

These documents explain the way we approach some common issues and complaint types that we see at AFCA. However, it is important to understand that each complaint 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 AFCA Approach document can cover everything you might want to know about key issues.

1 At a glance

1.1 Scope

The purpose of this document is to explain AFCA's approach to proof of despatch complaints, where an individual states they were unaware of the extent of their cover (and / or any limits or exclusions) because they did not receive their insurance policy documents.

1.2 Who should read this document?

- Financial firms, consumers and consumer representatives who have a complaint at AFCA that includes proof of despatch.
- Anyone who wants to understand how AFCA applies legal principles, industry codes and good industry practice when considering complaints where the issue of proof of despatch is raised.

The AFCA Approach to section 54 of the Insurance Contracts Act provides further guidance on dealing with these issues.

1.3 Summary

In a case where an individual's receipt of policy documents is in question, AFCA will seek to understand:

- Can the insurer provide adequate evidence of its process for the despatch of documents?
- Were the documents despatched in accordance with this process? Documents may be sent by post or email, provided the complainant consented to receive documents in this way.
- Can the insurer provide evidence that the insured was clearly informed of any terms it seeks to rely on.

If the insurer cannot do so, this does not mean the complainant is entitled to full payment of their claim. Rather, AFCA will consider the prescribed events, exclusions and minimum amounts which may apply under the Insurance Contracts Regulations.

2 In detail

2.1 Insurer obligations under the *Insurance Contracts Act 1984*

The insurer's obligations with respect to the despatch of documentation is set out in section 72A of the *Insurance Contracts Act 1984* (Cth) (the Act):

A notice or other document that is required or permitted by this Act to be given to a person in writing may be given:

to a body corporate in any way in which documents may be served on the body corporate, or

to a natural person:

Personally, or

By post to that person at the person's last known address.

A notice or other document may also be given to a person by electronic communication in accordance with the *Electronic Transaction Act 1999* and any regulations made under that Act.

In relation to the renewal of a policy, section 58 of the Act requires an insurer to advise an insured of policy renewal options no later than 14 days prior to the policy expiry date.

2.2 Providing documents by email – obligations under s 72A of the Act

Under section 72A of the Insurance Contracts Act, the financial firm is required to send written notices such as a renewal notice to the insured's last known address.

However, section 72A contains a provision stating that pursuant to the *Electronic Transactions Act 1999* (Cth) (the ET Act), information can be provided electronically where the person to whom the information is required to be given consents to the information being given by way of electronic communication. Section 9(1) of the ET Act effectively says the financial firm can send information electronically, if it is in a readily accessible format and the complainant consents to receiving information in this manner.

Consent is defined under the ET Act to include consent that can be reasonably be inferred from the conduct of the persons concerned.

Standard cover applies if the insurer fails to provide adequate proof of despatch

Under section 35 of the Act, an insurer is not entitled to rely on the terms of a contract of insurance unless it can show that it clearly informed the insured in writing of those terms when the contract was entered into.

If the insurer is unable to provide sufficient proof it despatched the relevant documents, the relevant minimum standard cover provided under the Insurance Contracts Regulations (2017) will apply.

2.3 What information does AFCA need?

From the insurer

When AFCA considers a complaint about the provision of documents, FOS Circular, Issue 3 (July 2010) sets out guidelines for the insurer and the complainant to follow. This article has been reproduced at Appendix A.

Where an insurer claims they sent the documents, the insurer usually needs to establish it has a satisfactory process in place for the despatch of documents, and the documents were despatched in accordance with the process.

AFCA may ask the insurer to provide:

- Details of how the policy was incepted, including any records (if relevant), such as correspondence and call recordings.
- Confirmation of the original postal / email address provided by the insured at inception.
- Details of whether the insured notified the insurer (for instance, by completing a form) of their preferred method of communication.
- Any other evidence the insured consented to receive communication by a specific method (email or post).
- A copy of the document it says it sent to the complainant.
- A copy of any record held by the insurer showing the document was actually sent and the date it was sent.
- A detailed explanation of its usual process for sending documents of the same sort.
- A copy of any record showing the process followed to send the document, and, if the record was part of an internal report, an explanation of that record and/or report.
- Where the document is said to have been sent in a group of documents sent out by the insurer or its agent on the same day, a signed statement by an appropriately qualified individual which provides:
 - > identification and explanation of any computer or other records/reports the insurer relies on to show the document was one of a group of documents despatched either directly by the insurer or through its agent
 - > where the insurer has used an agent to send the document, the agent's records show the document was included in the group of documents it received from the financial firm for despatch that day
 - > information to show the document was actually posted that day (e.g. postal company collection records match with the insurer's or agent's record of the group of documents to be despatched that day).
- Information to show the address the document was sent to was identified in the insurer's records as the last known address of the insured.

- Confirmation the document was not returned to the insurer, including an explanation of the insurer's usual process for identifying documents have been returned as undelivered.

Marsh v CGU Insurance Ltd (2004) NTCA 1 established that it may be inferred a person likely received documents if there is sufficient evidence the insurer had a robust document provision process in place.

From the complainant

Where documents may have been sent to an incorrect or previous address, AFCA will ask the complainant to provide:

- Confirmation of the original postal / email address provided to the insurer at inception.
- Any written evidence they sent to the insurer informing it of their correct or new address.
- If they informed the insurer by means other than in written correspondence:
 - > the date the conversation took place
 - > the name of the person the complainant spoke to
 - > what was said
 - > any contemporaneous notes taken by the complainant at the time.
- An explanation of how the insurance policy was taken out.
- Details of whether the insured notified the insurer (for instance, by completing a form) of their preferred method of communication.
- Confirmation of whether the complainant received the initial policy, either by email or postal mail.
- Confirmation of whether the complainant received earlier communications from the financial firm and, if so, by what method.

3 References

| Term | Definition |
|----------------|--|
| Complainant | a person who has lodged a complaint with AFCA |
| Financial firm | a financial firm such as an insurer, who is a member of AFCA |

Useful links

| Document type | Title / Link |
|---|--|
| Insurance Contracts Act | This Commonwealth statute can be found here: legislation.gov.au/Details/C2019C00115 |

| Document type | Title / Link |
|---|--|
| Electronic Transactions Act | This Commonwealth statute can be found here: legislation.gov.au/Details/C2011C00445 |
| Austlii | Austlii is a free resource that contains a full extract of most of the judgments issued in Australia austlii.edu.au |

Appendix A – FOS Circular, Issue 3: Establishing that documents have been sent (July 2010)

Where a decision in relation to a dispute depends on FOS deciding whether or not a financial services provider (FSP) sent, and an applicant received, a specific document (eg a renewal, certificate of insurance, policy document, cancellation notice, letter of offer or default notice etc), there are steps both parties will need to take to satisfy FOS about the dispatch and receipt of the document.

The requirements listed below apply to many of the disputes we consider at FOS but there may be additional or alternate requirements created by applicable legislation or codes.

FSP wishing to satisfy FOS that a document was sent

Where an FSP seeks to rely on the delivery of a document to an applicant, the FSP usually needs to establish to FOS's satisfaction that, on the balance of probabilities, it sent the document to the applicant's last known address. In order to achieve this outcome, the FSP will need to provide FOS with the following:

- A copy of the document it says it sent to the applicant (Document).
- A copy of any record held by the FSP showing that the Document was actually sent and the date the Document was sent.
- A detailed explanation of its usual process for sending documents of the same sort.
- A copy of any record showing the process that was followed to send the Document, and, if the record was part of an internal report, an explanation of that record and/or report.
- Where the Document is said to have been sent in a group of documents sent out by the FSP or its agent on the same day, a signed statement by an appropriately qualified individual which sets out the following relevant information:
 - > Identification and explanation of any computer or other records/reports the FSP relies on to show that the Document was one of a group of documents that was dispatched either directly by the FSP or through its agent.
 - > Where the FSP has used an agent to send the Document, the agent's records show that the Document was included in the group of documents it received from the FSP for dispatch that day.
 - > Information to show the Document was actually posted that day (eg postal company collection records match with the FSP or agent's record of the group of documents to be dispatched that day).
- Information to show that the address the Document was sent to was identified in the FSP's records as the last known address of the applicant.
- Confirmation that the Document was not returned to the FSP, including an explanation of the FSP's usual process for identifying that documents have been returned as undelivered.

Where the FSP is only able to provide a template rather than a copy of the Document sent

Sometimes, FSPs make a commercial decision not to keep copies of documents sent. Therefore the FSP may only be able to provide to FOS a template of the Document it says it sent (template Document).

If the template Document contains fields of information which are not completed and are relevant to the issues in dispute, FOS will require the FSP to provide information to show how the fields were completed. This would include the date and the address contained in the letter. If the FSP is unable to do so, it is unlikely FOS will be satisfied, on the balance of probabilities, that the Document containing the relevant information relied on was sent and/or that it contained the information the relevant information. FOS recommends that FSPs keep a record of relevant Documents sent to customers, either on a file or in electronic form, for at least a minimum period of seven years. This will ensure that if there is a dispute lodged with FOS, a copy of the Document can be produced as opposed to a template Document.

Applicant wishing to establish that a document was not sent and received

If an applicant says they did not receive the Document because the FSP sent it to an old or incorrect address, the applicant should provide the following information to FOS:

- A copy of any written correspondence the applicant sent to the FSP informing it of their correct address.
- If no written correspondence was sent, information as to how the applicant informed the FSP of their correct address. If this was conveyed by phone or face to face, this information should include:
 - > the date of the conversation
 - > the name of the person within the FSP's business whom the applicant spoke to
 - > the content of the conversation (ie what was said), and
 - > any record the applicant made of the conversation at the time.

FOS may make additional enquiries of both the FSP and the applicant in order to satisfy itself that a document was sent and/or received.