The AFCA Approach to section 47 of the Insurance Contracts Act

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

Sickness and disability insurance policies commonly contain an exclusion for claims resulting from a condition that the consumer had before the contract of insurance was entered into (a 'pre-existing condition').

Section 47 of the *Insurance Contracts Act 1984* (the Act) limits the circumstances where an insurer can rely on such a provision. An insurer cannot rely on such a provision where the insured was not aware of, and a reasonable person could not be expected to have been aware of, the pre-existing condition (the Act uses the terms 'sickness' or 'disability').

This document sets out how AFCA applies section 47 and the key issues in its application.

The approach has been adopted from AFCA's predecessor scheme, the Financial Ombudsman Service

1.2 Summary

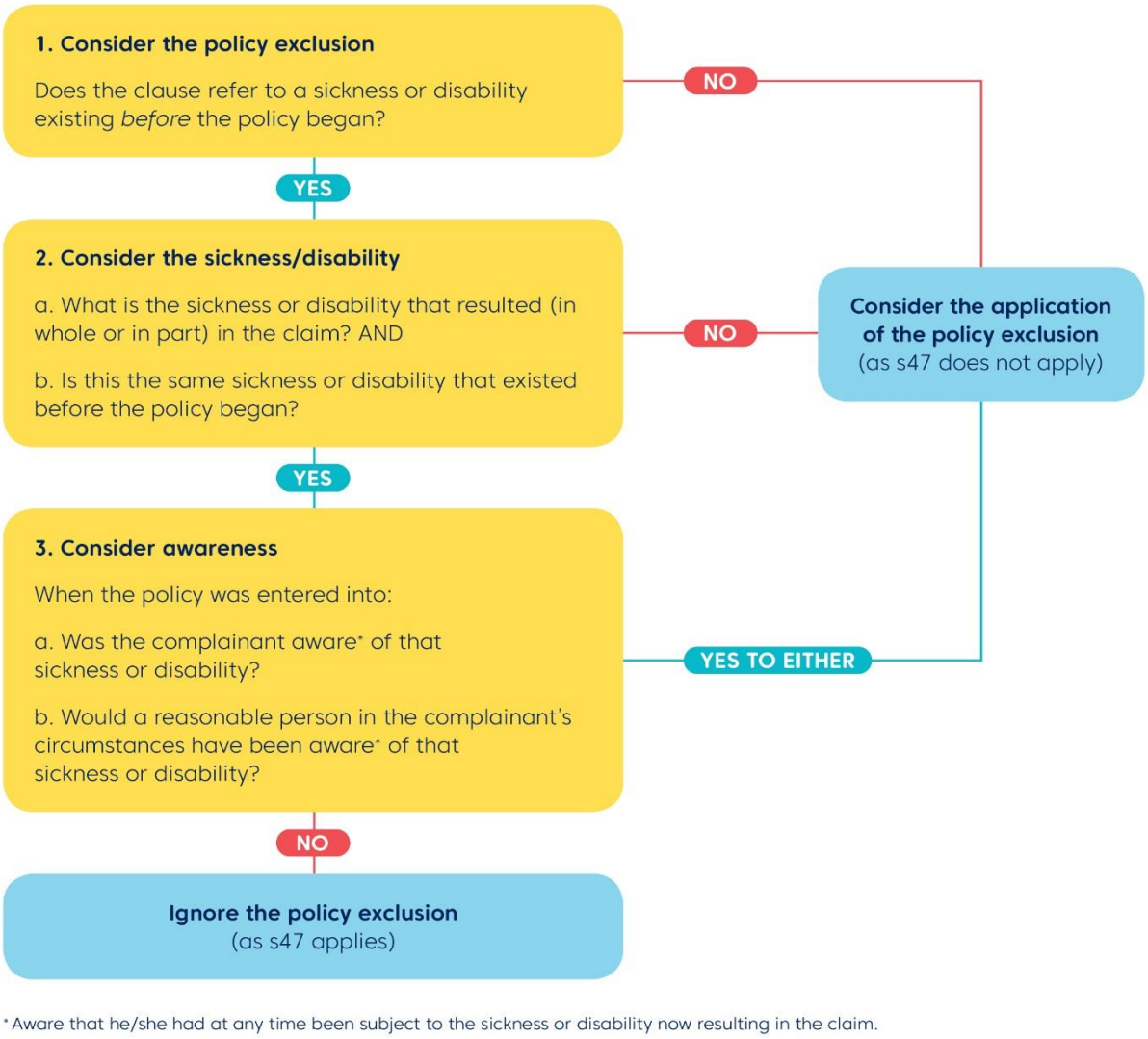
Section 47 benefits a consumer where:

- the consumer had a pre-existing condition, being a condition before the contract was entered into
- the pre-existing condition resulted in a claim, and
- the consumer was not aware of, and a reasonable person in their circumstances could not be expected to have been aware of, the pre-existing condition before the contract was entered into (**the key issue**).

The following circumstances illustrate how AFCA applies section 47:

- If the consumer was aware of the pre-existing condition at any time before the contract was entered into, section 47 will not assist them. This is even if the consumer reasonably believed they no longer had the pre-existing condition.
- If the consumer was aware of symptoms associated with the pre-existing condition, but not the actual condition itself, AFCA will consider whether the consumer should reasonably have been aware that they were suffering from a condition. This will depend on various considerations, such as the degree of symptoms and/or extent of medical investigation/consultation undertaken.
- If the consumer was not aware of the symptoms or the diagnosis when the contract was entered into, and a reasonable person in their circumstances could not have been expected to have been so aware, then section 47 will assist them.

Section 47 Flowchart



*aware that he/she had at any time been subject to the sickness or disability now resulting in the claim.

2 In detail

2.1 Awareness is the key issue

What circumstances would give rise to section 47 being considered?

Section 47 can only apply if all the following are satisfied:

- A claim is made for a loss.
- The claim resulted, in whole or in part, from a sickness or disability that existed before the contract was entered into (the pre-existing condition).
- There is a policy provision the financial firm can rely on to deny a consumer's claim if it results from a condition that existed before the policy was entered into.

- At the time the contract was entered into the consumer was not aware, and a reasonable person in their circumstances could not be expected to have been aware, of the pre-existing condition.

A policy provision that excludes claims arising from cancer would not trigger section 47. This is because the provision is a broad exclusion – it is not about pre-existing cancer.

Similarly, section 47 does not apply to a waiting period policy provision.

What is the key issue to be determined?

The key issue is whether the consumer was not **aware** of, and a reasonable person in the consumer's circumstances could not be expected to have been **aware** of, the pre-existing condition before the contract was entered into.

If it is clear that the consumer was aware of the pre-existing condition at the time the contract was entered into, section 47 does not apply.

The responsibility is on the consumer to establish that section 47 applies on the balance of probabilities, rather than on the insurer to disprove its application.

What common scenarios would give rise to this key issue?

Complaints about the consumer's awareness generally arise in the following circumstances:

- The consumer was aware of symptoms associated with the condition but not the actual condition itself (e.g. the consumer was undergoing investigations at the time of arranging the policy but had not yet received the actual diagnosis).
- The consumer believed the condition had been treated and cured.

What is the purpose of section 47?

Section 47 ensures that the insurer bears the risk of unknown pre-existing conditions in circumstances when the policy would otherwise cover the condition in question.

In the absence of section 47, it would be possible for insurers to limit or exclude liability for losses resulting from an unknown condition.

Section 47 ensures that insurers cannot rely on policy exclusions for pre-existing conditions if, when the policy was entered into:

- the consumer did not know, and
- a reasonable person in their circumstances could not be expected to have known of the existence of the pre-existing condition.

What if the consumer believed the pre-existing condition was cured?

If the consumer was aware of the pre-existing condition before the contract of insurance was entered into, case law states that section 47 will not assist them if that pre-existing condition returns and results in a claim.

This is because the consumer was aware of the pre-existing condition when entering into the policy. As a result, section 47 does not apply even if the consumer believed the condition had been cured by that time.

2.2 Symptoms

Must the consumer be aware of the diagnosed condition?

Where the consumer is experiencing symptoms or undergoing investigations, the situation is more complicated.

The issue that often arises in this context is whether 'awareness' requires knowledge of:

- the actual pre-existing condition itself (i.e. the diagnosis), or
- symptoms that could be associated with the pre-existing condition.

In line with AFCA's obligations to decide complaints based on what is fair in all the circumstances while having regard to the law, industry codes and practice as well as previous determinations, AFCA's view is the answer lies somewhere between the two.

Why does the answer lie between awareness of symptoms and the condition?

AFCA does not accept that mere knowledge of symptoms is necessarily conclusive in establishing awareness of the pre-existing condition. Applying section 47 in this manner would lead to particularly unfair and harsh outcomes in cases where the symptoms are innocuous.

For example, where:

- a consumer suffers a sore throat at the time of taking out the policy, and
- symptoms subsequently persist and exacerbate, investigations are undertaken and the consumer is later ultimately diagnosed with throat cancer.

AFCA does not accept that the fact the consumer was aware of the sore throat means that the consumer was also 'aware' of the throat cancer. It would have been reasonable for the consumer to simply associate a sore throat with a common cold.

Therefore, in these circumstances, section 47 would assist the consumer.

In contrast, AFCA recognises that section 47 is potentially open to misuse if it is interpreted to mean that a consumer is not 'aware' of the condition unless and until they are informed of the actual diagnosis.

For example, where:

- a consumer was coughing up blood, consulting doctors and undergoing invasive investigative tests before arranging a policy, and
- shortly after the policy was issued, the consumer was diagnosed with stomach cancer.

AFCA would not apply section 47 in these circumstances.

This is because a reasonable person in the consumer's circumstances would be expected to have been aware that they were potentially suffering from a serious condition, when entering into the policy.

This is also consistent with the purpose of section 47 as set out above.

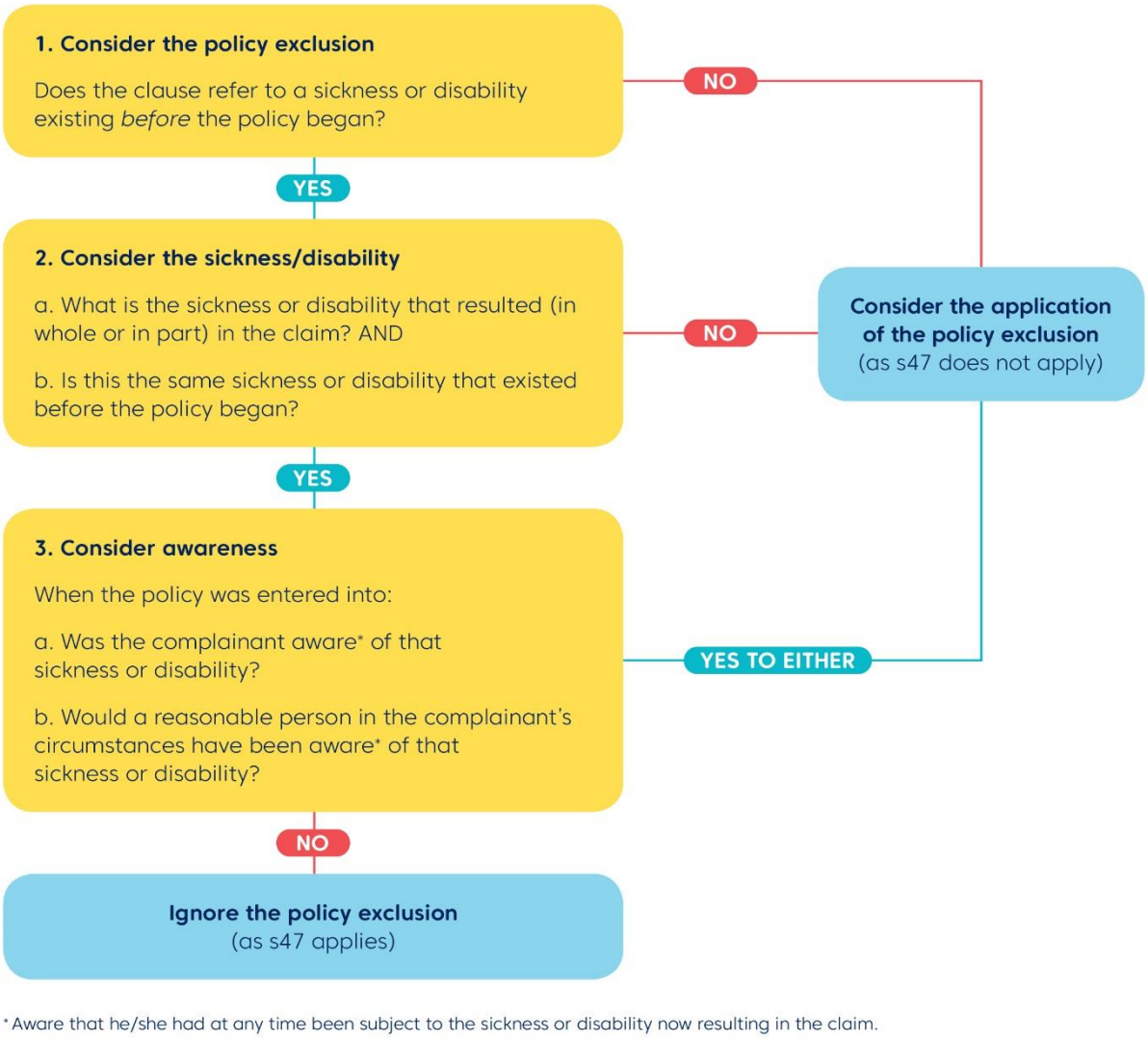
What matters would AFCA take into account in these circumstances?

In considering 'awareness' for the purposes of section 47, AFCA takes into account various matters, including:

- the nature and severity of symptoms suffered by the consumer
- the timing of the sequence of events
- the consumer's medical history, and
- the level of medical consultation and/or investigation undertaken.

Therefore, AFCA requires information that addresses these matters.

Section 47 Flowchart



* aware that he/she had at any time been subject to the sickness or disability now resulting in the claim

3 Context

3.1 Case studies

The case studies below are based on determinations by one of AFCA's predecessor schemes, the Financial Ombudsman Service. While previous determinations (by AFCA or by its predecessor schemes) are not binding precedents, where relevant they will inform AFCA's approach to an issue.

Case 1: Chronic fatigue syndrome (CFS)

The consumer arranged a travel policy on 20 August 2012. On 10 September 2012, the consumer was diagnosed with CFS and subsequently hospitalised in November 2012.

The consumer cancelled the trip and lodged a claim for the costs incurred.

The insurer denied the claim on the basis that the CFS was a pre-existing medical condition.

FOS considered that section 47 operated to prevent the financial firm from relying on the policy exclusion on the following basis:

- The consumer only first consulted a GP on 28 August 2012.
- While the consumer suffered from symptoms, such as lethargy, for 8 months before this, she was attending work and playing regular competitive sport. She also engaged in various other activities.
- Her symptoms could reasonably be expected to have been associated with her extensive activities, rather than a particular medical condition.

Based on the above FOS, did not accept that the consumer was aware of, or a reasonable person in her circumstances could have been expected to have been aware of, the CFS before the policy was issued.

Case 2: Recurring Sickness

A life insurance policy was issued to the consumer and her partner on 13 December 2006. On 11 February 2012, the consumer lodged a claim as a result of her partner's death a month before.

The insurer denied the claim on the basis the death arose due to a pre-existing condition, namely a grade 3 anaplastic oligodendroglioma. FOS was satisfied the illness that resulted in the husband's death was related to that pre-existing condition.

The consumer argued neither she nor her husband were aware of the condition. This is because they did not receive the diagnosis until 22 December 2006, being over a week after the policy commenced.

However, the following had been undertaken by the consumer's husband prior to the contract being entered into:

- He visited his general practitioner (GP) on 4 December 2006 presenting with symptoms including an inability to complete sentences, disorientation, lack of motivation and memory lapses.
- He undertook a CT scan later that day on the GP's instruction – the result was the identification of a 6cm lesion.

- On 12 December 2006, he had the lesion surgically removed.

In context of the timing, the symptoms suffered and the degree of medical consultations and procedures undertaken, FOS concluded that a reasonable person in the husband's circumstances would have been aware of the sickness, even though he had yet to receive the precise diagnosis.

Therefore, section 47 did not assist the consumer.

3.2 References

Definitions

Term	Definition
Financial firm	An organisation or individual such as an insurer, that is a Member of AFCA
ICA	*Insurance Contracts Act 1984*
Sickness and disability policies	An insurance policy that provides a benefit in the event a consumer suffers from a sickness or disability. This includes consumer credit, personal accident and sickness, income protection, trauma and TPD policies.
Pre-existing condition	A sickness or disability that existed before the policy was issued

Useful documents

Document	Title / Link
Insurance Contracts Act	This Commonwealth statute can be found at http://bit.ly/28PlNoZ.
Austlii	Austlii is a free resource that contains a full extract of most of the judgments issued in Australia over the last 20 years: www.austlii.edu.au