

RECENT FOS & SCT DECISIONS

You Booze, You Lose

[Link to determination](#)**Facts**

Following the death of the Life Insured, the Applicant made a claim for payment of a death benefit (the Claim) pursuant to a life insurance policy (the Policy) issued by the financial services provider (FSP). The direct cause of the Life Insured's death was from injuries sustained as a pedestrian from a motor vehicle collision, which was not disputed by the FSP.

The Policy provided, however, that a benefit would not be paid if the Claim, directly or indirectly, was a result of the consumption of alcohol or drugs other than those prescribed and taken as directed by a registered doctor (the Exclusion). The FSP applied the Exclusion and declined the Claim as it considered that the available evidence showed that the Life Insured's consumption of alcohol and taking cannabis led indirectly to his death.

The Applicant submitted that the FSP had not proven that the Exclusion applied, that section 54 of the *Insurance Contracts Act 1984* (ICA) prevented the FSP from refusing to pay the Claim and that in dealing with the Claim, the FSP had engaged in discrimination.

The Applicant argued that there was no evidence to suggest that the Life Insured's decision to cross the road, and the way he crossed the road, was done because of impairment and any suggestion was speculative. The Applicant also argued that there may have been other causes of the accident such as visibility issues which include that it was a dark night with no moon, there were tree shadows over the road and there was evidence that a street light was malfunctioning.

Alternatively, the Applicant submitted that the Policy was unsuitable for the Life Insured due to his long standing alcohol dependency, and his death would have more

likely than not been caused directly or indirectly by consumption of alcohol due to this in any case.

The Applicant claimed compensation for non-financial loss under the Financial Ombudsman Service Australia (FOS) Terms of Reference (ToR) arguing that when providing goods and services, the FSP subjected the Life Insured to direct or indirect discrimination and discriminated against the Life Insured on the ground of his disability, which was alcohol dependence.

Issues

1. Was the death of the Life Insured indirectly caused by his consumption of alcohol and a drug and therefore did the FSP correctly decline the claim in applying the Exclusion?
2. Does section 54 of the ICA prevent the FSP from relying on the exclusion and declining the claim?
3. Was the Policy unsuitable?
4. Has the FSP engaged in discrimination?

Determination***Was the death of the Life Insured indirectly caused by his consumption of alcohol or drugs?***

Based on the evidence, the FOS determined that it was more probable than not that the Life Insured's decision to cross the road, and his crossing of the road, was done because of impairment which arose from his consumption of alcohol and a drug which led to poor hazard recognition, judgment, perception and ability to respond in a timely manner. The FOS determined, therefore, that the Claim resulted indirectly from the consumption of alcohol with some drug involvement and that the FSP was entitled to apply the Exclusion and decline the Claim.

While the FOS established that poor visibility would have prevented the driver from seeing the Life Insured in time to avoid colliding with him, it noted that the fact that visibility issues contributed to the death logically, it did not preclude there being other indirect causes of death. Furthermore, it considered that the visibility issues would have had an impact on the driver but would not have had a significant effect on the Life Insured's decision to cross the road.

Does section 54 of the ICA prevent the FSP from refusing to pay the claim?

The FOS held that section 54 of the ICA does not prevent the FSP from relying on the Exclusion and declining the claim because the FSP established that the death of the Life Insured was indirectly caused by his consumption of alcohol or taking drugs. This was an act by the Life Insured which was capable of causing or contributing to the loss and hence under the terms of the section it did not apply in such a case.

Was the Policy unsuitable?

The FOS disagreed with the Applicant's submission that the Policy was unsuitable due to his longstanding alcohol dependence. Had, for example, the Life Insured been a passenger on a bus and died in a bus crash, then despite any alcohol present in his blood, it would not be concluded that alcohol consumption contributed to his death benefit claim. Furthermore, the Applicant could not show that as at the inception of the Policy, the FSP was aware of the Life Insured's long standing alcohol dependence.

Has the FSP engaged in discrimination?

With respect to whether the FSP engaged in discrimination, the FOS determined that the Exclusion and the application of the Exclusion by the FSP did not subject the Life Insured to discrimination and detriment nor to discrimination on the grounds of a disability of which the Life Insured was suffering. The Exclusion applied to any insured person whose claim to be paid a benefit arose directly or indirectly from a specific result. The Exclusion did not require a person to have a condition of substance dependency abuse, or to have a disability or to have a history of injury after consuming alcohol or taking drugs.

The FOS held that the Applicant had not established an entitlement to be paid compensation for nonfinancial loss under the FOS ToR.