



INCOME PROTECTION, DEATH AND TOTAL AND PERMANENT DISABLEMENT

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The *Insurance Contracts Act* and Non-Disclosure

*Proper pre-contractual disclosure and an insurer's remedies for non-disclosure;
Fraudulent claims*

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Pre-contractual disclosure

- 1 Insurers require information in order to decide whether to grant insurance to a proposed insured, and on what premium and what terms. This is called underwriting information. Invariably it is governed by the insurer's internal underwriting guidelines. Usually a proposed insured completes a proposal by which it answers a series of questions asked by the insurer.
- 2 In addition to information provided in the proposal there will be categories of information that a proposed insured is required by law to give to the insurer before a contract of insurance is entered into. If the proposed insured fails to give the required information the insurer might be entitled to avoid or reduce its liability to pay for a claim that would otherwise be covered by the policy that is subsequently entered into. The relevant statutory provisions are found in Division 1 of Part IV of the *Insurance Contracts Act 1984* (Cth) (**ICA**).

- 3 Insurance has been described as mutual bets. The insured bets in favour of suffering a loss and is prepared to pay an irrecoverable premium for the value of a loss that might occur. The insurer bets against a loss occurring and accepts a non-refundable premium that is well below the value of a potential claim on the basis that a loss is not likely to occur. An insurer requires information to better inform itself as to whether the risk of insuring the proposed insured is worth taking, whether the risk should only be accepted on particular terms, and as to the amount of premium that should be charged to justify taking on the risk that a claim might be made under the policy.
- 4 The allied, but distinct, topic of misrepresentation is covered by Division 2. A false statement in a proposal is a misrepresentation. Remedies for both non-disclosure and misrepresentation are in Division 3. The statutory remedies are “exclusive of any right that the insurer has otherwise than under [the] Act in respect of a failure by the insured to disclose a matter to the insurer before the contract was entered into and in respect of a misrepresentation or incorrect statement: s33. Accordingly, the insurer cannot rely on remedies of misrepresentation or misleading conduct in the areas of contract, tort, equity, or statutory consumer laws. Division 3 is an exhaustive statement of the insurer’s rights.

Contracts of general insurance and life insurance

- 5 Particular statutory rules apply to non-disclosure in the context of contracts of life insurance. The rules for other contracts of insurance are similar in a number of respects but not identical. The difference between two classes of insurance must be understood. A contract of insurance that is not a contract of life insurance is called a contract of general insurance: s11(6).

- 6 A contract of sickness and accident insurance might be a life insurance contract or it might be a contract of general insurance. The distinction is governed by the duration of the contract. Contracts of sickness and accident insurance for a term of 12 months are examples of contracts of general insurance.

Life insurance

- 7 A contract of life insurance under the ICA is a contract that constitutes a life policy under the *Life Insurance Act 1995* (Cth) (**LIA**). A life policy includes:

7.1 A contract of insurance which provides for payment on the death of a person or a contingency that is dependent on termination or continuance of human life: s9(1). However a contract that provides for payment on death will not be a life policy if its duration is no more than one year and payment is made only in the event of death from accident or from a specified sickness: s9(2);

7.2 An investment account contract or an investment-linked contract, as defined: s9(1);

7.3 A continuous disability policy: s9A. This is a contract of insurance of more than 3 years' duration under which a benefit is payable in the event of:

7.3.1 death by accident or some other stated cause; or

7.3.2 injury or disability as a result of accident or sickness; or

7.3.3 the insured being found to have a stated condition or disease.

There is a number of contracts that are excluded from the definition of continuous disability policy.

General obligation of disclosure

The duty

8 Before the contract of insurance is entered into an insured (at the relevant time, a proposed insured) has a duty to disclose certain matters to an insurer. The duty is imposed by s21 of the ICA. If there is more than one insured the duty is imposed on each insured.

Insurer's obligation to notify nature and effect of duty

9 Unless the contract was arranged by an insurance broker (s71 ICA), before the contract is entered into the insurer must clearly inform the insured in writing about the nature and effect of the insured's disclosure obligations and that the duty applies until the proposed contract is entered into: s21. In the case of a contract of life insurance:

9.1 The notice must also be about the effect of s31A, which concerns the obligation of disclosure by a life insured who is not the insured;

9.2 Notice must also be given to any person other than the insured who would become the life insured: s22.

10 Prescribed forms of notice have been published in the *Insurance Contracts Regulations 2017*.

11 Notices can be given electronically: s9 *Electronic Transactions Act 1999* (Cth). An electronic communication is defined in that Act (s5) to include a communication of information in the form of data, text or images by means of guided and/or unguided electromagnetic energy.

12 If a compliant notice has been given to the insured but there has been a delay of 2 months from the time of disclosure to the time when the insurer accepts an offer to enter into a contract, or makes a counter offer, the insurer must give the insured a reminder that the duty applies until the contract is entered into: s22(3).

- 13 If the notice is not given the insurer may not exercise a right in respect of a failure to comply with the duty of disclosure unless the failure was fraudulent: s22(5).

Entering into a contract of insurance

- 14 In the case of a contract of life insurance a reference to entering into a contract of insurance includes making an agreement to extend or vary the contract. In the case of any other contract it includes an agreement to renew, extend or vary the contract: s11(9).

What must be disclosed

By the insured

- 15 The duty requires disclosure of any “matter” that has the following characteristics:

15.1 The insured knows the “matter”; and

15.2 The matter is:

15.2.1 known by the insured to be relevant to the decision of the insurer whether to accept the risk, and if so on what terms; or

15.2.2 one that a reasonable person in the circumstances could be expected to know to be a matter so relevant having regard to factors that include but are not limited to:

15.2.2.1 the nature and extent of the insurance cover to be provided under the relevant contract; and

15.2.2.2 the class of persons who would ordinarily be expected to apply for insurance cover of that kind: s21(1).

- 16 The matter is not required to be disclosed if:

16.1 It diminishes the risk;

16.2 It is of common knowledge;

16.3 The insurer knows or in the ordinary course of the insurer's business as an insurer it ought to know;

16.4 The insurer has waived compliance with the duty of disclosure: s21(2).

Life insured

17 Corresponding provisions apply in respect of a life insured, who is not a party to the contract of insurance. Where the life insured is a person other than the insured the life insured must disclose any "matter" that has the following characteristics:

17.1 The "matter" is known to the life insured; and

17.2 The matter is:

17.2.1 known by the life insured to be relevant to the decision of the insurer whether to accept the risk, and if so on what terms; or

17.2.2 one that a reasonable person in the circumstances could be expected to know to be a matter so relevant having regard to factors that include but are not limited to:

17.2.2.1 the nature and extent of the insurance cover to be provided under the relevant contract; and

17.2.2.2 the class of persons who would ordinarily be expected to apply for insurance cover of that kind: s31A(2).

18 The matter is not required to be disclosed if:

18.1 It diminishes the risk;

18.2 It is of common knowledge;

18.3 The insurer knows or in the ordinary course of the insurer's business as an insurer it ought to know the matter;

18.4 The insurer has waived compliance with the duty of disclosure: s31A(3).

19 A group life contract means a contract of life insurance maintained for the purposes of a superannuation or retirement or other scheme under which there can be more than one life insured: s11. The provisions of the ICA concerning non-disclosure and misrepresentation apply at the time when the proposed life insured under a group life contract became a life insured: s32.

Eligible contracts of insurance

20 In the case of “eligible contracts of insurance” (motor vehicle, home buildings, home contents, sickness and accident, consumer credit, or travel insurance) the insurer must ask the proposed insured specific questions: s21A. The insurer will not be entitled to ask a “catch all” question about whether there is any other matter that should be disclosed that is relevant to its decision whether to accept the risk and on what term.

21 The duty of disclosure will be discharged if in answer to each specific question the insured discloses, or in the case of renewal any change or that there has been no change in, each matter that is:

21.1 Known to the insured; and

21.2 A reasonable person in the circumstances could be expected to have disclosed in the circumstances: s21A(5) and 21B(7), (8) and (9).

Waiver of disclosure obligation

22 A class of waiver is provided by s21(3). The insurer is deemed to have waived compliance with the duty of disclosure where the insured failed to answer or gave an obviously incomplete or irrelevant answer to a question in a proposal form.

23 In the case of “eligible contracts of insurance” an insurer will waive compliance with the duty of disclosure in relation to the original contract unless before the original contract was entered into the insurer has requested the insured to

answer one or more specific questions relevant to its decision whether to accept the risk, and if so, on what terms: s21A(2) and (3).

- 24 Upon renewal of an eligible contract of insurance an insurer will waive compliance with the duty of disclosure in relation to renewal unless before renewal the insurer requested the insured to answer one or more specific questions relevant to its decision whether to accept the risk, and if so, on what terms or gave the insured a copy of any matter previously disclosed and asked the insured to disclose any change or confirm that there has been no change to that matter: s21B(3). The waiver will not affect any failure to comply with the duty in respect of the original contract or any earlier renewal: s21B(12).
- 25 The insurer will not be entitled to ask a “catch all” question about whether there is any other matter that should be disclosed that is relevant to its decision whether to accept the risk and on what terms: ss21A(4) and 21B(5) and (6).
- 26 Where the insurer gave the insured a copy of any matter previously disclosed and asked the insured to disclose any change or confirm that there has been no change to that matter, and the insured said or was taken to have said that there had been no change, neither s21(3) nor s27 apply in respect of a failure to disclose a change: s21B(11).
- 27 Questions may be framed in the proposal form in a manner that implies that the insurer only wants information on the matters in the proposal and within the limits indicated by the proposal and in such a case the insurer, for practical purposes, waives the requirement to provide a higher level of disclosure of material information: see **Schoolman v Hall** [1951] 1 LI LR 139, 143.

Proof of breach of duty of disclosure

Knowledge

- 28 Section 21(1)(a) of the ICA looks to, and requires proof of, two aspects of the knowledge of the insured: first, knowledge of a “matter” and, secondly, knowledge that the matter is relevant to the decision of the insurer whether to accept the risk: ***Commercial Union Assurance Co of Australia Ltd v Beard*** (1999) 47 NSWLR 735, 745 [38], [1999] NSWCA 422.
- 29 The knowledge of the insured that is required under s.21 is actual knowledge: ***Commercial Union Assurance Co of Australia Ltd v Beard*** *ibid* [37]; ***Hammer Waste Pty Ltd v QBE Mercantile Mutual Ltd*** [2002] NSWSC 1006 [50], [56]. The obligation to disclose something “known” attaches only to a matter that at the time of disclosure the person actually had in his consciousness: ***Hammer Waste Pty Ltd v QBE Mercantile Mutual*** [56].
- 30 A suspicion, assumption or belief does not amount to knowledge unless the belief is held with sufficient assurance that it justifies the term “known”: ***Permanent Trustee Australia v FAI General Insurance Ltd*** (1998) 44 NSWLR 186, 247; (2001) 50 NSWLR 69, 688 [2001] NSWCA 20, see also [2003] HCA 25 [30]; ***Hammer Waste*** [58].
- 31 A matter that has been forgotten is not a matter that is “known”: ***Hammer Waste*** [57].
- 32 Possessing a document that contains the relevant knowledge is not knowledge itself. Access to a means of knowledge is not sufficient: ***Commercial Union Assurance Co of Australia Ltd v Beard*** 750 [63]. It is possible that knowledge may be derived from a document where the person has immediate access to and knowledge of the document as the source of information, for example, a

driver's license in a wallet as a source of knowledge in the individual's driver's license number: *Ibid*. However this is a debatable proposition.

- 33 The insurer carries the burden of proving that the insured knew, or a reasonable person in the circumstances could be expected to know, that the claimed matter was relevant to the decision of the insurer whether to accept the risk and if so on what terms: ***Commercial Union Assurance Co Australia Ltd v Beard*** 739.

Remedies

- 34 Remedies for breach of the obligation of disclosure for contracts of general insurance are set out in s28 of the ICA, and in s29 for contracts of life insurance.

Contracts of general insurance

- 35 Section 28 of the ICA provides an insurer with remedies for conduct by the insured that amounts to misrepresentation or breach of the duty of disclosure and occurred before the contract of general insurance was entered into. Section 28 does not apply where the insurer would have entered into the contract, for the same premium and on the same terms and conditions, even if the insured had not failed to comply with the duty of disclosure or had not made the misrepresentation before the contract was entered into: s28(1).
- 36 Section 28 provides a remedy for the insurer where there has been non-disclosure or misrepresentation by any insured: ***Advance (NSW) Insurance Agencies Pty Ltd v Matthews*** (1989) 166 CLR 606. Where the contract is obtained by more than one insured (for example, a husband and wife or a partnership) s21 imposes an obligation on each insured. If there has been a relevant failure by any one insured to disclose a fact that should have been disclosed and the insurer would not have entered into the contract of insurance

had it known the relevant facts then the insurer will have no liability to the other insureds even though they did not know the relevant facts.

- 37 If the conduct of non-disclosure or misrepresentation was fraudulent the insurer may avoid the contract: s28(2). If the insurer is not entitled to avoid the contract or has not done so its liability for a claim is reduced by the amount that would place it in a position it would have been in if the conduct had not occurred: s28(3). Depending on what the insurer can prove to be the position it would have been in it is possible for the insurer to carry no liability.

Contracts of life insurance

- 38 Section 29 of the ICA provides an insurer with remedies for conduct by the insured that amounts to misrepresentation or breach of the duty of disclosure and occurred before the contract of life insurance was entered into. Section 29 does not apply where:

38.1 The insurer would have entered into the contract even if the insured had not failed to comply with the duty of disclosure or had not made the misrepresentation before the contract was entered into;

38.2 The conduct was in respect of the date of birth one or more life insureds: s29(1).

- 39 The remedy that may be available depends on:

39.1 Whether the conduct was fraudulent;

39.2 If the conduct was not fraudulent:

39.2.1 whether a notice has been given to the insured varying the contract and the content of the notice;

39.2.2 the nature of the notice given.

- 40 The insurer may avoid the contract:

40.1 If the conduct was fraudulent: s29(2); or

- 40.2 If the conduct was not fraudulent within 3 years from the date when the contract was entered into: s29(3).
- 41 If the insurer has not avoided the contract it may vary the contract:
- 41.1 By substituting for the sum insured a sum that is not less than the sum insured reduced by the ratio of the premium payable to the premium that would have been payable if the conduct had not occurred: 29(4);
- 41.2 If it has not reduced the sum insured, in a manner that places the insurer in the position it would have been in if the conduct had not occurred: s29(6). The variation must not be inconsistent with the position other reasonable and prudent insurers would have been in under similar contracts and where there had been no failure to comply with the duty of disclosure and no misrepresentation by the insureds under those contracts: s29(7); and
- 41.3 In either case the variation takes effect from the time when the contract was entered into: s29(9).
- 42 For contracts of life insurance with a surrender value or that provide cover for the death of a life insured the insurer will not be able to vary the contract of insurance under s29(6) and (7) but may alter premium under s29(4) before the expiration of 3 years after the contract was entered into: s29(10).
- 43 Where the date of birth of a life insured was not correctly stated:
- 43.1 The insurer may vary the contract by substituting for the sum insured a sum that is not less than the sum insured multiplied by the ratio of the premium payable to the premium that would have been payable according to the correct date of birth: s30(2)(a);

43.2 And the sum insured is less than the amount so ascertained the insurer is required to:

43.2.1 reduce the premium to the amount that would have been payable for a contract based on the correct date of birth and repay the amount of overpayment with interest; or

43.2.2 substitute for the sum insured the greater amount so ascertained: s30(2)(b);

43.3 And the expiration of the contract of life insurance is calculated by reference to the date of birth of the life insured, instead of making the changes referred to in s30(2), the insurer may vary the contract by changing the expiration date to one based on the correct date of birth: s30(3A);

44 And in any of these cases the variation takes effect from the time when the contract was entered into: s30(4).

Examples of cases of alleged non-disclosure

Phillips v ING Life Limited [2009] FCA 283

45 The insured, Mr Phillips, had a life insurance policy with ING. When he applied for the insurance he knew he had a condition of abnormal cells in his oesophagus called "Barrett's Oesophagus". The condition was not malignant but was associated with an increased risk of developing oesophageal cancer. He had been undergoing precautionary examinations, endoscopies, but the results were always satisfactory. He was regularly taking a drug called Zoton. It was a drug to prevent or treat ulcers.

- 46 The insured died of oesophageal cancer. His widow made a claim under policy. ING denied liability on the ground that Mr Phillips had not disclosed the Barrett's Oesophagus and various consultations and investigations for it.
- 47 The trial judge held that the Barrett's Oesophagus should have been disclosed. In his view it was material because it posed a risk to his life expectancy and he took measures to reduce the risk including taking medication daily and regular intrusive investigative procedures.
- 48 He found that Mr Phillips, or a reasonable person in the circumstances, knew that Barrett's oesophagus was a matter relevant to ING's underwriting decision. He rejected the widow's arguments that ING impliedly represented to Mr Phillips the matters that it wanted to know and waived any requirement to disclose more by accepting an incomplete proposal form, not requiring Mr Phillips to complete a health history in an insurance proposal, and by indicating what was relevant by a question and answer session that was undertaken and controlled by a nurse for ING, and no question was ever asked that called for the answer Barrett's oesophagus.
- 49 Another issue in the case was whether ING had given a valid notice in writing that entitled it to reduce its liability under the contract of insurance. Notice was given to the widow, rather than to (as asserted by the widow) the insured's personal representative. The trial judge held that notice had been given to the widow as the personal representative.
- 50 The widow appealed. The appeal was fully argued but later resolved so that a judgment on the appeal was never delivered.

Stealth Enterprises Pty Ltd v Calliden Insurance Ltd [2017] NSWCA 71

51 The insured owned a brothel in the Australian Capital Territory. It obtained an “Adult Industry Insurance Policy” insuring against property damage and liability. The brothel was damaged by fire.

52 Calliden denied liability to indemnify on the ground that the insured did not disclose that its sole director and the manager of the business were members of the Comancheros bikie gang association and the brothel’s registration under the *Prostitution Act 1992 (ACT)* had lapsed. It asserted it would not have provided cover. Its position was upheld at first instance but overturned on appeal.

53 The New South Wales Court of Appeal held that:

53.1 It was not established that a reasonable person in the circumstances could be expected to know the association was relevant to the insurer’s underwriting decision;

53.2 A reasonable insured could understand that an underwriter specialising in the insurance of brothels would expect that people with criminal connections were likely to be involved in the use of the premises;

53.3 If it was relevant to the insurer to know of the fact of any general association between the insured and any particular activity or organisation, a reasonable insured might have expected that there would be questions in the proposal addressed to that subject.

54 The Court of Appeal held that it was not established that had disclosure of the lapsed registration been made the insurer would not have renewed or otherwise insured the premises at the time of the fire.

55 In September 2017 two judges of the High Court refused an application for special leave on the grounds that the application did not raise a question of principle

suitable for the grant of special leave and there was no reason to doubt the correctness of the decision of the Court of Appeal.

Fraudulent claims

56 The common law position was that if the insured made a fraudulent claim the whole policy, and not just the particular claim, was voidable. The making of a fraudulent claim was a breach of the duty of utmost good faith: ***Britton v Royal Insurance Co*** (1866) 4 F&F 905, 909.

57 A claim founded on facts that the insured knows are not true is fraudulent. Exaggeration may also amount to fraud. In ***Norton v Royal Life Assurance Co*** [1885] *The Times*, 12 August, the finding at first instance (1885) 1 TLR 460 that a claim for £274 in respect of a loss of £87 was not fraudulent was reversed. In ***Central Bank of India v Guardian Assurance Co*** (1937) 54 LLR 247 a claim figure of nearly 100 times the actual value of the goods destroyed was held to be fraudulent.

Sections 12, 13, 54 and 56 of the Insurance Contracts Act

58 Part II (ss12 to 15) of the ICA concerns the duty of utmost good faith.

59 Section 12 provides that the effect of this part is not limited or restricted in any way by any other law, including the subsequent provisions of this Act, this part does not have the effect of imposing on an insured, in relation to the disclosure of a matter to the insurer, a duty other than the duty of disclosure.

60 Section 13(1) imposes the duty of utmost good faith as a contractual term and provides:

“A contract of insurance is a contract based on the utmost good faith and there is implied in such a contract a provision requiring each party to it to act towards the other party, in respect of any matter arising out under or in relation to it, with the utmost good faith.”

- 61 Good faith may require an insurer to act honestly and consistently with commercial standards of decency and fairness, with due regard to the interests of the insured: ***CGU Insurance Limited v AMP Financial Planning Pty Ltd*** (2007) HCA 36.
- 62 The reference to a party to the contract includes a reference to a third party beneficiary under the contract: s13(3). However s13 only applies in relation to a third party beneficiary after the contract is entered into: s13(4). A “third party beneficiary” is a person who is not a party to the contract but is specified or referred to in the contract, whether by name or otherwise, as a person to whom the benefit of the insurance cover provided by the contract extends: ICA s11(1). A “third party beneficiary” (previously “a person who is not a party to a contract of general insurance, whether by name or otherwise”) is placed in the same position regarding rights and obligations as the insured under the contract of general insurance: ICA s48.
- 63 A failure to comply is also a breach of the requirements of the Act: s13(2).

Cancellation

- 64 In the event of breach of this duty the insured may claim damages subject to ordinary contractual principles. If the insured is in breach of the duty of utmost good faith the insurer is entitled to cancel the contract: s60. If the insured makes a fraudulent claim under a contract of life insurance, or under another contract of insurance that provides cover for part of the period of insurance under the first contract, the insurer may cancel the contract: s59A. An insurer may only cancel a contract of life insurance as provided by the ICA, or s210 of the LIA (after notice of non-payment of premium).

Refusal to pay

65 If a claim is made fraudulently by the insured under a contract of insurance, or by a person who is not the insured under the ICA, the insurer may not avoid the contract but may refuse to pay the claim: s56. The ICA does not define what it means by “made fraudulently”. It appears to mean deliberately withholding information that the proposed insured knows will affect the insurer’s decision on whether to grant cover or as to premium or terms.

66 Section 56(1) provides as follows:

“56

(1) Where a claim under a contract of insurance, or a claim made under this Act against an insurer by a person who is not the insured under a contract of insurance, is made fraudulently, the insurer may not avoid the contract but may refuse payment of the claim.”

“Little” fraud

67 A “little fraud” can be excused by the Court.

68 Section 56(2) and (3) provides as follows:

“56

(2) In any proceedings in relation to such a claim, the Court may, if only a minimal or insignificant part of the claim is made fraudulently and non-payment of the remainder of the claim would be harsh and unfair, order the insurer to pay, in relation to the claim, such amount (if any) as is just and equitable in the circumstances.

(3) In exercising the power conferred by subsection (2), the Court shall have regard to the need to deter fraudulent conduct in relation to insurance but may also have regard to any other relevant matter.”

69 In ***Gugliotti v Commercial Union Assurance Company of Australia*** (1992) 7 ANZ Ins.Cas. 61-104, the insured’s car was almost totally destroyed in an accident. In the claim form both the insured and the driver answered in the negative a question as to whether the driver in the 12 hours before the accident had consumed intoxicating liquor. In fact the driver had consumed alcohol and the driver knew that this was so. A magistrate held that the claim form was false and fraudulent and the claim was dismissed. On appeal it was held that there was

ample evidence to support a finding that the insured deliberately inserted a false answer in the claim form and the case fell squarely within s56 and s54 had no application to such a case.

70 The Court also held that this was not a case where “only a minimal or insignificant part of the claim is made fraudulently”. The fraud tainted the whole claim. Thus it appears that for fraud to be “only a minimal or insignificant part of the claim” the fraud must be minimal or insignificant in the context of the total claim.

71 In ***Entwells Pty Ltd v National & General Insurance Co Ltd*** [1991] WASC 286; (1991) 6 ANZ Ins.Cas. 61-059 the insured’s supermarket was destroyed by fire. It was held that the fire had been caused by arson by an unidentified person with the connivance of the insured. The Court proceeded to consider a further defence that a fraudulent claim had been made, but on the assumption that the fire had not been caused with the connivance of the insured. When the claim was made the insured fraudulently exaggerated the amount of stock that had been destroyed. The Court would have disallowed the claim for loss of stock and would have allowed the other claims that were unaffected by the fraud.