

AFCA UPDATES ITS APPROACH TO NON-DISCLOSURE AND MISREPRESENTATION

Current as at 28 July 2020

Overview

AFCA has released an update [The AFCA Approach to non-disclosure and misrepresentation](#) setting out its approach on how it handles complaints from consumers when an insurer denies a claim on the basis of breach of duty of disclosure or making of a misrepresentation (i.e. Sections 21, 21A, 21B, 22 and 28 of the Insurance Contracts Act 1984 (Cth) (the Act)).

This updates a previous AFCA [document](#) but does not reflect any significant change in approach. It adds a summary of the factors AFCA will consider in determining disputes in these scenarios and other relevant factors to ensure its decision is fair as well as more recent AFCA determinations.

Summary of factors AFCA will consider in determining disputes related to non-disclosure and misrepresentation

AFCA starts by summarising a list of factors that it will take into consideration in determining disputes regarding non-disclosure and misrepresentation:

- For **innocent non-disclosure** (non-fraudulent), AFCA will consider:
 - Has the insurer clearly informed the complainant of their duty of disclosure?
 - Has the complainant failed to comply with their duty of disclosure?
 - Can the insurer show the extent of its prejudice?
- For **innocent misrepresentation** (non-fraudulent), AFCA will consider:
 - Has the complainant made a misrepresentation?
 - Did the complainant, or a reasonable person in their circumstances, know their misrepresentation was relevant to the insurer's decision to accept the risk?
 - Can the insurer show the extent of its prejudice?
- **Other relevant factors** to ensure the decision is fair including:
 - if the complainant provided an obviously incomplete or irrelevant answer;
 - if the complainant genuinely believed the answer provided was true; or
 - if avoiding the policy is unfair.

AFCA notes that a misrepresentation or non-disclosure is considered fraudulent if the person did so knowingly, without belief in its truth, or recklessly. This requires clear and convincing evidence in support. If AFCA is satisfied the misrepresentation or non-disclosure is fraudulent, the insurer will generally be able to avoid the policy and deny a claim.

Innocent non-disclosure

AFCA requires an insurer to show the following in order to refuse payment of a claim:

- The complainant was clearly informed of the general nature and effect of their duty of disclosure before the relevant policy was issued – the relevant policy is the one that would respond to the claim.

AFCA notes that an insurer is not legally required to clearly inform the complainant of their duty of disclosure at each renewal because if the insurer has done so once, then effectively they have been deemed to do so at each subsequent renewal (section 11 of the Act). However, AFCA may consider it *unfair* if the information was provided a long time ago.

- If the policy was an 'eligible contract of insurance' (as defined in the Act i.e. policies solely covering one or more of the standard types of covers in the Act as defined in the

Regulations - motor vehicle, home building, home contents, travel, consumer credit or personal accident and sickness – to which the special obligations in sections 21A and 21B apply):

- The insurer asked the complainant a specific question (if the non-disclosure relates to when the policy was first issued i.e. s21A) [no guidance is provided on what AFCA considers to be a specific question]; or
 - The insurer (if the non-disclosure relates to the policy being renewed i.e. s21B) either:
 - asked the complainant a specific question; and/or
 - gave the complainant a copy of the matters previously disclosed and asked the complainant to inform it of any change.
 - The complainant did not accurately respond to the question or update the information previously given [AFCA does not note that on renewals no response from an insured is a deemed no change response per s21B];
 - The complainant knew the correct answer and a reasonable person in their circumstances would have disclosed this information. AFCA notes that the phrase in the Act of 'a reasonable person in the circumstances' is generally an objective test although a degree of subjectivity must be applied. AFCA looks at a reasonable person in the same circumstances as the complainant.
- If the policy is not an 'eligible contract of insurance' (i.e. section 21 duty applies):
 - the complainant knew about the information;
 - the complainant, or a reasonable person in their circumstances, knew this information was relevant to the insurer's decision to accept the risk;
 - the complainant did not disclose this correct information.

AFCA notes that a person is only required to disclose what they know i.e. they need to disclose something that was subject to a true belief, held with sufficient assurance to justify the term 'known'. It means considerably more than suspects or strongly suspects. Therefore, if a person disclosed something they believed was the truth (i.e. held with sufficient assurance to justify the term 'known'), then there is no non-disclosure even if that belief was wrong. However, if they have disclosed something they have not 'known' (i.e. they guessed or suspected the answer), then they have not complied with their duty of disclosure.

AFCA also notes that each renewal is a separate contract of insurance. Therefore, it is important to identify which period of insurance is relevant to the alleged failure. This includes ensuring the failure is continuing, operative or applicable. For example, a person may have failed to disclose a licence suspension they had in the past 5 years when the policy was first issued. However, if by the next renewal that suspension was more than 5 years old, it is no longer continuing, operative or applicable for that renewal.

- The extent of the insurer's prejudice by the complainant's failure to disclose this information. AFCA notes that normally, the insurer establishes prejudice if it can show it would not have issued a policy or would have issued the policy on different terms that would have resulted in a different outcome (e.g. an exclusion would have been imposed that would have applied to the claim).

If the insurer shows that their prejudice is that no policy would have been issued, then AFCA notes that the premium should be refunded from the point in time they would not have offered insurance. This is because the extent of their prejudice does not include the retention of the premium. The prejudice is limited to the claim itself.

AFCA concludes that even if the insurer can establish all this, AFCA will consider any other aspect of the Insurance Contracts Act that may be relevant. For example, if the complainant provided an obviously incomplete or irrelevant answer (s 21(3)) or the insurer already knew about the matter (s 21(2)(b)).

AFCA may also consider other matters it believes are relevant, such as, if the complainant was in a vulnerable situation (e.g. had minimal literacy skills, limited understanding of English) and the insurer was aware of this. This is a key issue for insurers to focus on in considering whether to exercise rights for non-disclosure or misrepresentation.

AFCA considers this approach to be fair in all the circumstances because:

- it is mostly consistent with the Act, which was designed to ensure a fairer application compared to the previous common law;
- it provides sufficient flexibility to take into account unusual circumstances that can arise in these matters.

Innocent misrepresentation (sections 23, 24, 26, 27 and 28 of the Act. Note this can often be made in conjunction with an innocent non-disclosure argument)

AFCA requires an insurer to show:

- The complainant made a statement before the contract was entered into.
- This statement was either a:
 - statement of fact that was untrue;
 - statement of opinion that was not the subject of an honestly held belief; or
 - statement of intent that never existed at the time provided.
- The complainant knew the statement was relevant to the insurer's decision to accept the risk, or a reasonable person in the circumstances could be expected to know the matter was so relevant.
- The extent of the insurer's prejudice by the misrepresentation. [AFCA notes that its approach here is essentially the same as prejudice for innocent non-disclosure above].

AFCA will also consider any other provision of the Act that may be relevant. For example, if the complainant genuinely believed the answer to be true, and a reasonable person in their circumstances would have formed the same belief (s 26(1)), or the insurer's question was ambiguous (s 23).

AFCA may also consider other matters it believes are relevant along the same basis as for innocent non-disclosure above (i.e. complainant was in a vulnerable situation).

Fraudulent misrepresentation and fraudulent non-disclosure

AFCA states that a misrepresentation or non-disclosure is fraudulent when the person did so knowingly, without belief in its truth or recklessly (not caring whether it is true or false). If it was made negligently or carelessly, AFCA does not treat this as fraud.

As fraud is a serious allegation, AFCA expects the insurer to provide clear and convincing evidence to establish this.

If successful, the insurer can generally void the policy if it can show that it would not have issued the same policy for the same premium if the correct information was disclosed.

AFCA does note that in limited cases, voiding the policy may not be fair e.g. when the information not disclosed made little difference to the insurer's position and it would have simply charged a slightly higher premium or imposed a condition that made no difference to its liability.

AFCA will at least consider the following factors in terms of fairness (it notes that this is consistent with the application of s 31 of the Insurance Contracts Act which allows a court to disregard avoidance for fraud in certain circumstances):

- the extent of prejudice the non-disclosure or misrepresentation had on the insurer's position;
- the requirement to deter fraudulent conduct;
- whether the impact extends beyond the person who perpetuated the fraud (e.g. an innocent co-insured).

What information does AFCA need?

From the insurer

AFCA may ask the insurer to address the following:

- Clarification on what basis it is denying the claim
- How was the policy arranged?
- Was the duty of disclosure provided?
- What questions were asked of the complainant or its representative?
- How did the insurer record the response(s) provided by the complainant?
- A copy of the underwriting guidelines (at least of the relevant extracts) and a statutory declaration from the underwriter confirming how the insurer would have assessed the complainant's risk if accurate information was provided.
- Does any discretion apply to the insurer's underwriting decision?
- Proof of despatch of documents (if the complainant says they did not receive the insurer's correspondence, especially the renewal certificate).
- Product Disclosure Statement
- Certificate of insurance and/or Renewal certificate
- Has the insurer cancelled the policy?
- From when should the insurer refund the premium?

From the complainant

AFCA may ask the complainant to address the following:

- A description of when the damage occurred
- An explanation of how the insurance policy was taken out:
 - Did the complainant do it themselves or through an agent or broker?
 - Was the policy purchased online, over the phone, at a branch?
- Did the complainant complete and/or sign a form? If so, have they got a copy of the form?
- Does the complainant recall being asked the specific question in dispute? If so, do they recall how they responded?
- Did the complainant receive the policy documents (Product Disclosure Statement and Certificate of insurance, renewal certificate)? If so:
 - Did they read the documents?

- Did they notice any error? If yes, did they attempt to correct this with the insurer?

Case studies

AFCA provides useful updated case studies based on its determinations.

Case 1: A case of criminal acts ([655054](#))

Case 2: A case of context and risk ([634952](#))

Case 3: A case of underwriting ([647598](#))

AFCA is likely to release another update in relation to its approach on handling these kinds of complaints when the duty of disclosure regime is significantly amended by the [Financial Sector Reform \(Hayne Royal Commission Response – Protecting Consumers \(2020 Measures\)\) Bill 2020: FSRC rec 4.5 \(duty of disclosure to insurer\)](#) once in force.

IMPORTANT NOTICE

This document is designed to provide helpful general guidance on some key issues relevant to this topic. It should not be relied on as legal advice. It does not cover everything that may be relevant to you and does not take into account your particular circumstances. It is only current as at the date of release. You must ensure that you seek appropriate professional advice in relation to this topic as well as to the currency, accuracy and relevance of this material for you. Liability limited by a scheme approved under Professional Standards Legislation. Legal practitioners of Radford Lawyers Pty Limited are members of the scheme