

***Remedies for Non Disclosure & Misrepresentation***  
***and***  
***Considerations for Underwriting & Claims***

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# INSURANCE CONTRACTS ACT (ICA) - overview

## Purpose

*“An Act to reform and modernise the law relating to certain contracts of insurance so that a fair balance is struck between the interests of insurers, insureds and other members of the public and so that the provisions included in such contracts, operate fairly and for related purposes”.*

## ICA Review

- in progress
- Will impact future remedies – but not for existing portfolios

## NON DISCLOSURE – what must be disclosed?

### Section 21 (1)

Establishes a positive obligation on the insured to disclose:

- Every matter “*known to the insured*” which:
  - is relevant to the decision of the insurer whether to accept the risk, and if so, on what terms **and**
  - is a matter that the insured *knows* is so relevant **or**
  - a reasonable person in the circumstances could be expected to know to be relevant
- Knowledge means “*considerably more than believes or even strongly suspects*” (***Permanent Trustee v FAI***)
- Duty to disclose continues until time contract commences

## **NON DISCLOSURE – what does not need to be disclosed?**

### **Non Disclosure (cont.)**

#### **Section 21(2)**

The duty of disclosure does **not** require the disclosure of matters:

- That diminish the risk
- Are of common knowledge
- The insurer knows or in the ordinary course of its business ought to know
- The insurer has waived compliance with the duty

#### **Section 21(3)**

Waiver – where failure to answer question or answer is obviously incomplete

## LIMITS ON THE DUTY TO DISCLOSE

**Section 22** Insurer to inform of duty of disclosure:

- before the contract is entered into;
- notice must be clear and in writing; and
- must advise general nature and effect of the duty

*{Proposed reforms repeal this section and replaces it with substantially same effect that:*

- *any notification given must explain the duty continues until the contract entered.*
- *where insurer's acceptance or counter offer is more than 2 months after most recent disclosure, the insurer must remind insured that duty to disclose applies until contract is entered*
- *Notice must also be given to the LI – as duty to disclose now extended to LI}*

Non compliance = unable to allege failure of duty to disclose unless failure was fraudulent

# MISREPRESENTATION

## What is a Misrepresentation?

Is a statement or representation which is made to convey a false impression. It may be a 'no' answer to a specific question where the true answer is 'yes'

**Section 25** Misrepresentation by LI is attributed to insured

**Section 26** Certain Statements not misrepresentations

- if statement by applicant untrue but made on basis of a reasonable belief held by the applicant, it will not be a misrepresentation
- in any case, a statement is not a misrepresentation unless person knew, or a reasonable person would have known it was relevant to insurer's decision

**Section 27**

Failure to answer question or obviously incomplete answer – not a misrep.

# NON DISCLOSURE & MISREPRESENTATION

## - Remedies

**Remedies governed by s29 and s31 of ICA**

**S29 – time since policy commenced & underwriting evidence will determine options**

- S29(1) – insurer must first show it would not have entered into 'the contract'.
- S29(3) – if policy within 3 yrs, can avoid policy if insurer would not have offered a contract of life insurance on any terms
- S29(4) – if within 3 years can vary the policy in the manner outlined in the formula
- S29(2) – if fraud is established, a policy can be avoided at any time.

**S31 – in cases involving fraud, court discretion to disregard avoidance & allow insured to recover whole or part of the benefit as is 'just & equitable' in the circumstances. May only be exercised where no or minimal prejudice to insurer**

**In all cases, underwriting evidence will be pivotal to consideration of remedies. FICS requires supporting underwriting evidence in format of Practice Note 1.**

## Fraud???

- Fraud involves a false statement made:
  - knowingly, or
  - without belief in its truth, or
  - recklessly not caring whether it be true or false, and
  - with intention that it be acted upon by the insurer (***Tyndall Life v Chisholm***)
- Allegation of fraudulent conduct is serious, heavy onus on insurer to prove
- Proof must be clear or strict – “inexact proofs, indefinite testimony or indirect references are insufficient”
- Courts & Tribunal will not easily find fraud – insured will get benefit of doubt.
- Assess & test evidence – relevance, credibility, consistency, quality & weight.
- Any waiver or estoppel??

## Fraud – some guidance

- ‘Recklessness’ is not carelessness – must have no honest belief in the truth of answers; conscious indifference to the truth (***Muggleston v National Mutual***)
- Fraudulent misrepresentation – statement made:  
*“with an absence of an actual and honest belief in its truth. It is a deliberate decision by the insured to mislead or conceal something from the [insurer], or recklessness amounting to indifference about whether this occurs.”* (***NRG Victory v Hudson***)
- However, a deliberate non disclosure does not necessarily constitute fraud – it turns on the state of mind of the insured as the insured may not appreciate materiality of the matter not disclosed.
- Involves ‘element of dishonesty & moral turpitude’; state of mind the key – a deliberate non disclosure does not necessarily constitute fraud (***AC&L v Hall***)
- Proof required? More than balance of probabilities but not criminal standard. Clear or strict proof is necessary because of the seriousness of the matter. Need ‘reasonable satisfaction’ but this not to be produced by inexact proofs, indefinite testimony or indirect references (***Briginshaw v Briginshaw***)

***Carelessness is not enough & deliberate decision to not disclose may not be fraud if life insured held honest belief.***

## Fraud - considerations

- ‘**Actual** knowledge’? If yes, was there an ‘**honest**’ **belief** that the matters were ‘minor’ or ‘irrelevant’ and did not require disclosure?
- Would a reasonable person have considered the matters relevant?
- Did Insured provided sufficient information to put the insurer on notice?
- Other relevant matters inc:
  - *time since last treatment/consultation; number of treatments &/or medication*
  - *was insured told about the condition?*
  - *any time off work?*
  - *Types of questions asked & their clarity*
- “Show cause letter” - consistency & credibility of insured’s explanation
- Adviser’s position and evidence – was insured advised of duty to disclose? How was application completed? (**need adviser statement**)
- Was the matter known to insurer in the conduct of its business?

***Clinical notes are very helpful in revealing actual knowledge of insured & significance of condition – but be careful with interpretation***

## Non disclosure & misrepresentation

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### Quick Guide to ICA remedies

Underwriting Position	Policy less than 3 yrs old	Policy more than 3 yrs old
Policy not offered on any terms	Avoid – s29(3)	If fraudulent – avoid per s29(2). If not fraud – no remedy
Benefit not supported financially	If no policy on any terms – avoid per s29(3) If reduced sum insured but policy offered – can only reduce benefit if policy permits <b>or</b> insured agrees	If fraudulent – avoid per s29(2) If not fraud - can only reduce benefit if policy permits <b>or</b> insured agrees
Policy offered on different terms (e.g. exclusion; different b/p)	No remedy. Can seek to negotiate changes – <b><u>but beware duty of utmost good faith</u></b>	If fraud – avoid per s29(2) If not fraud – no remedy. May seek to negotiate revised terms – even if fraud as this allows insured to maintain policy
Premium loading	Apply s29(4) formula Not helpful for disability policies	As above – except the negotiation impacts premium.

## **GUIDE TO REMEDIES – proposed reforms**

### **Proposed Section 27A**

*Will permit policies to be regarded as ‘unbundled’ (or split) into respective covers for the purposes of exercising remedies*

### **Proposed Section 28A**

- *‘Living Insurance Cover’ products covered by new s28A*
- *Principal of proportionality will enable insurer to reduce liability in event of non disclosure or misrepresentation ‘to the amount that would place an insurer in a position in which the insurer would have been if the failure had not occurred or misrepresentation not made’*
- *Where a benefit would not have been offered, liability may be reduced to nil*

### **Amendment to Section 29**

- *Will only apply to Term policies or policies with a surrender value*
- *S29(3) amended from ‘a contract’ to ‘the contract’. Now, insurer need only show it would not have issued ‘the same cover’ on the same terms.*

## Other Provisions

### Group Superannuation Schemes

Currently, s32 applies to non disclosure or misrepresentation of a member of a 'blanket superannuation scheme'. Duty was deemed to apply from date joined fund rather than date the member obtained cover.

*{Proposed reforms will:*

- *bring the duty to disclose into line with the application for cover*
- *clarify that cover under the Group Life policy can be separately avoided*
- *Expand s32 to apply to stand alone Group plans, not just those with superannuation schemes}*

## Underwriting Issues - Recent FICS Decision

### FICS D14395

#### Facts

- ✓ One application – 4 separate policies
- ✓ Alleged non disclosure/misrep in regard to 7 matters
  1. 'usual' doctor
  2. Alcohol abuse
  3. High Blood Pressure
  4. Musculoskeletal injuries
  5. Visual disturbances/'floaters'
  6. Irritable Bowel Syndrome
  7. Stress, depression & anxiety

## Underwriting Issues - Recent FICS Decision (cont)

### Underwriting Evidence

- ✓ Would not have offered policies for IP, BE and TPD
- ✓ Would have offered Life/CI
- ✓ Decision based largely on guidelines for mental disorders (with associated alcohol abuse) – ‘moderate to severe’ neurosis = decline

### Decision

- ✓ Did not find non disclosure in all matters (only 4 of 7)
- ✓ Disagreed with underwriter’s application of guidelines to the depression – ‘mild’
- ✓ Insurer could not rely on s29(3) as it would have offered a policy

## Comments on D14395 – application of s29(3)

- **Seeks to apply Schaffer v RSA but....**
  - error in para 198 (cites para 40 of Schaffer which analysed s29(1) not s29(3))
  - preferable judgment in Schaffer is Davies JA not McPherson JA (as per case of Davis v Westpac Life)
  - in Schaffer, Davies JA repeatedly refers to *'the risk'*
  - Schaffer did not consider multiple policies
- **Unsupported by authority – goes well beyond Schaffer**
  - does not consider the Law Reform Commission Report
  - does not consider development of bundled products since inception of ICA
- **Appears to lack logical foundation**
  - different considerations for different policy types
  - multiple policies here – consideration of the Act is on 'the contract' – not any other contract
  - Panel's approach requires consideration of every type of cover an insurer may hypothetically accept
  - what if the applications made on slightly different dates?

## Comments on D14395 – application of FICS Rules

### FICS Rules

**Rule 5** – do what is fair & reasonable in the circumstances having regard to:

- applicable legal rule or judicial authority
- Principles of good industry practice

**Rule 14** – the service cannot deal with the following complaints

- A complaint about underwriting or actuarial factors leading to an offer of insurance on non-standard terms.
- A complaint about underwriting or actuarial factors leading to a rejection of an insurance proposal for commercial or medical reasons.

Are these rules reflected in the approach of the Panel to:

1. The application of s29(3)
2. The examination of the underwriting evidence

## Underwriting - the Application

### What helps?

- ✓ Rational & appropriate decisions – guidelines, statistics
- ✓ Documenting decisions – especially any departure from guidelines

### What Hurts?

- ✓ Overlooking other disclosures or non disclosures on the application
- ✓ Inconsistency
  - re guidelines
  - re other applications
- ✓ Negative criticism of underwriting in file notes
- ✓ Comfort Letters?

## Underwriting Issues – ‘retro’ underwriting

- ✓ Sound basis for decisions
- ✓ Retrospective decisions require:
  - the underwriter (if in court)
  - sound internal process & expertise
  - objectivity
  - focus on prior medical history not claim
  - avoid criticism of past practice
  - may need to address multiple alternative scenarios
- ✓ Be able to rationalise your decision at court or FICS

## Underwriting Evidence – in court

- ✓ 'the underwriter'?
- ✓ Evidence in chief usually needs to address multiple alternative scenarios
- ✓ The fundamental question is a hypothetical – what would the underwriter have done if there had been additional disclosure?
- ✓ Because it is a hypothetical, the Court (or a Tribunal) needs to believe that the underwriter would have done what he/she says they would have done
- ✓ If additional enquires would have been conducted – try to undertake them
- ✓ The Court (or a Tribunal) will look closely at what the underwriter has in fact done in relation to the application – past performance is critical

## What will happen at FICS – the underwriter

### FICS cases – comply with Practice Note 1

- ✓ Signed statement
- ✓ Details of underwriter
- ✓ Evidence of guidelines, manuals & internal memos
- ✓ Full explanation of use of discretion when guidelines may not apply

# Underwriting Issues - underwriting case studies

## Retrospective Opinion 1

*“at best, a mental health exclusion would have been applied, at worst cover would have been declined....would depend on information uncovered as a result of further investigations”*

What investigations? Information had been uncovered and was before the underwriter?

## Retrospective Opinion 2

- ✓ Underwriter 1 – would have deferred application pending outcome of tests
- ✓ Underwriter 1 – would have declined

How to deal with apparent inconsistencies?

**Importance of submissions – deal with all the issues and resolve apparent conflicts**

# QUESTIONS?

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