AIDA - RIO CONGRESS 2018

DISCLOSURE DUTIES IN INSURANCE

General Reporter: Peggy SHARON

Please answer the questions and clarify whether your response is based on legislation, court judgments or directives of any regulatory/supervisory authority.
Finally, your remarks and comments from your point of view will be appreciated.

QUESTIONNAIRE

1. The Insured's Pre-Contractual Disclosure Duty

a. Does your National Law impose a duty to answer questions put to the applicant/insured by the insurer?

b. Does your National Law impose upon the applicant/insured a duty to disclose information upon the applicant's own initiative? If so - under what circumstances?

Introduction
The pre-contractual duty of disclosure in Australia is codified by legislation in the *Insurance Contracts Act 1984* (Cth). With respect to a post-contractual duty of disclosure, the *Insurance Contracts Act* implies into a contract of insurance of duty of utmost good faith on the part of the parties. The scope of the duty of utmost good faith is not defined in the *Insurance Contracts Act* and is instead governed by the common law in Court judgments. This duty has been held by the High Court to require the parties to the contract of insurance to act in accordance with commercial standards of decency and fairness.

Answer to 1.
The *Insurance Contracts Act* imposes a duty on the insured to answer questions by the insurer and also to disclose information upon the insured's own initiative.

Section 21 of the *Insurance Contracts Act* provides that the insured has a pre-contractual duty to disclose to the insurer every matter known to the insured that either the insured knows to be relevant to the decision of the insurer to accept the risk or that a reasonable person in the circumstances could be expected to know as relevant.

The insured is however not required to disclose a matter that diminishes the risk, is of common knowledge, that the insurer knows or in the course of its ordinary business ought to know or as to which compliance with the duty of disclosure is waived by the insurer.

The insurer will be deemed to have waived compliance with the duty of disclosure if an insured failed to answer or provided an obviously incomplete or irrelevant answer to a question in a proposal form.

Section 21A relates to "eligible contracts of insurance". These include a contract for new business for motor vehicle insurance, home contents insurance and sickness and accident insurance. The insurer may request the insured to answer specific questions relevant to the decision of the insurer as to whether to accept the risk and on what terms. The insured is deemed to have complied with the duty of disclosure if in answer to each specific question included in the request, the insured discloses each matter that is known to the insured and that a reasonable person in the circumstances could be expected to have disclosed in answer to that question.

In circumstances where the contract of insurance is proposed by more than one insured, the High Court held in the case of *Advance (NSW) Insurance Agencies Pty Ltd v Matthews* (1989) 166 CLR 606 that section 21 imposes a duty of disclosure on each insured as opposed to a joint duty.

2. Scope of the Applicant's Disclosure Duty – Subjective or Objective?

Is the applicant's disclosure duty limited to the applicant's actual knowledge or includes also information which he or she should have been aware of?

The applicant's disclosure duty contains both subjective and objective elements. There are two limbs with respect to the duty of disclosure under section 21. The first limb provides that the matters that must be disclosed are confined to those matters within the applicant's actual knowledge. In the case of *ABN AMRO Bank NV v Bathurst Regional Council* (2014) 224 FCR 1, the Full Court of the Federal Court stated that section 21 is not breached by a failure to disclose a matter which is not actually known by the insured.

Once it is ascertained that a matter is within an applicant's actual knowledge, the second limb provides that the matter must be disclosed if it is relevant to the insurer's decision to accept the risk with respect to either the insured's subjective knowledge or the knowledge of a reasonable person on an objective basis.

3. The Insurers' Pre-Contractual Duties

a. Does your law impose on an insurer a pre-contractual duty to investigate the applicant's business in order to obtain the relevant information?

b. Does your law impose on an insurer a duty to ascertain the insured's understanding of the scope of the insurance, and to draw the insured's attention to exclusions and limitations?

Answer to a.
Australian law does not impose a pre-contractual duty on the insurer to investigate an applicant's business in order to obtain the relevant information. The duty of disclosure under section 21 imposes a duty on the insured to provide the relevant information.

Answer to b.
There is no positive duty on the insurer to ascertain the insured's understanding of the scope of the insurance, and to draw the insured's attention to exclusions and limitations. However, if the insurer fails to do so, it may not be able to rely on the relevant provision in the contract in certain circumstances.

Pursuant to section 14, if reliance by a party to a contract of insurance on a provision of the contract would be to fail to act with the utmost good faith, the party may not rely on the provision. In determining whether reliance by the insurer on a provision of the contract would be to fail to act with the utmost good faith, the Court is required to have regard to any notification of the provision that was given to the insured.

Section 37 provides that an insurer may not rely on a provision included in a contract of insurance of a kind that is not usually included in contracts of insurance that provide similar insurance cover unless, before the contract was entered into the insurer clearly informed the insured in writing of the effect of the provision.

4. The Insured's Post-Contractual Disclosure Duty

a. Does an insured have the duty to notify the insurer of a material change in risk? If so - what is the scope of the duty?

b. What is defined in your jurisdiction as a material change?

There is no express duty pursuant to the *Insurance Contracts Act* or under common law requiring the insured to notify the insurer of a material change in risk. Such a duty may be imposed by a term in the contract of insurance or may also be required as part of the insured's duty of utmost good faith.

The definition of a "material change" is dependent on the terms of the contract of insurance and interpretation by the Courts in the particular circumstances. Although there is no express duty, the failure by the insured to notify of a material change in risk may result in the claim being rejected, albeit subject to the application of section 54 which refers to the circumstances in which the insurer may refuse to pay a claim.

5. **The Insurer's Post Contractual Duty**

Does your law impose on an insurer disclosure duties after the occurrence of an insured event (such as, the duty to provide coverage position in writing within a limited period, duty to disclose all reasons for declination etc.)?

The *Insurance Contracts Act* and the common law do not expressly impose disclosure duties on the insurer after the occurrence of an insured event, although such duties may be a term of the insurance contract or required by the duty of utmost good faith. It has been held by the Courts that the duty of utmost good faith on the part of the insurer includes making a timely decision on a claim and communicating the decision to the insured.

6. **Remedies in Case of Breach of the Insured's Disclosure Duties**

a. What is the insurers' remedy in case an insured breached his/her pre-contractual disclosure duty ("all or nothing" rule or partial discharge)?

b. What is the insurers' remedy in case an insured breached his/her post-contractual disclosure duty ("all or nothing" rule or partial discharge)?

The remedies available to an insurer are contained in the *Insurance Contracts Act* and differ depending on the type of breach. The effect of these remedies is that it is very difficult for an insurer to completely avoid paying a claim.

If a breach of the pre-contractual duty of disclosure was fraudulent, the insurer is entitled under section 28(2) to avoid the contract from the outset. If the breach was not fraudulent, the insurer is not entitled to avoid the contract. Section 28(3) provides that liability of the insurer with respect to the claim is reduced to the amount that would place the insurer in the position as if the breach had not occurred.

The insured is not entitled to the remedies under sections 28(2) or 28(3) where the insurer would have entered into the insurance contract for the same premium and on the same terms and conditions, even if the insured had not failed to comply with the duty.

If the insured breaches a term of the contract with respect to post-contractual disclosure, the insurer may also refuse to pay a claim. This is subject to section 54 which provides that an insurer may not refuse to pay a claim by reason only of that act. Instead, the insurer's liability in respect of the claim is reduced by the amount that fairly represents the extent to which the insurer's interests were prejudiced as a result of that act. The insurer may only refuse to pay the claim where the act could reasonably be regarded as being capable of causing or contributing to a loss in respect of which insurance cover is provided by the contract, unless the insured proves that no part of the loss that gave rise to the claim was caused by the act.

In the case of *Ferrcom Pty Ltd v Commercial Union Assurance Co of Australia* Ltd (1993) 176 CLR 332, the insured failed to comply with a condition precedent to liability requiring it to provide notification of a material alteration to the risk. The High Court stated that in determining the applicable prejudice, it was required to compare the position that the insurer would have been in if the insured had performed the obligation with the position if insured had failed to perform the obligation. The High Court held that the insurer would have cancelled the policy and would not have been prepared to provide cover on other terms such that the insurer's liability was reduced to nil.

Section 60 further provides the insurer may cancel a contract of insurance if the insured fails to comply with the duty of disclosure under section 21, the duty of utmost good faith or a provision of the contract.