What do we need to tell our Insurer? … (and what happens if we don't?)

All insurance contracts have a duty of disclosure whereby the insured party must tell the insurer all relevant information before entering in to the policy and also during the course of the policy period.

In this sense the insurance contract is no different from any other contract which is capable of being set aside if it was created by a misstatement. Similarly in Australian Consumer Law if an agreement has been entered into based upon misleading and/or deceptive information the parties may not be bound by that agreement.

So how much do you need to tell the insurer?

We have all seen those wonderful cases in America in the movies where the insurer denies cover for a claim for personal injury in a fall because the insured failed to disclose that he had an earache. No, it is not really that bad.

In Australia the Insurance Contracts Act 1984 ("The Act") determines when and why an insurer can deny a claim. Section 21 makes it clear that the insured only has to tell the insurer about relevant matters, not matters which the insurer already knows or should know ,and not matters which would reduce the risk to the insurer. So how do you determine what is "relevant to the insurer"?

The question arises currently in a number of matters we have seen where owners have obtained a building defects report, or more particularly a workplace health and safety report which reports on all potentially dangerous aspects of the common property.

Owners may decide not to carry out all rectification immediately, or at all, so does this have to be disclosed to the insurer? For example, you have received a report which says that there is a big hole in the pavement of the common property and that this represents a trip hazard, and the strata committee decide to do nothing about it. If an accident does occur there and the insurer becomes aware of the report (which they will) they may well have a reasonable case to say that you failed to disclose a relevant and material fact to them.

Section 54 of the Act states that where the effect of the insurance contract is that, but for this section an insurer can refuse to pay a claim by reason of some act of the insured, the insurer may not refuse to pay the claim by reason only of that act but the insurer's liability for the claim is reduced by the amount which fairly represents the extent to which the insurer's interest were prejudiced as a result of that act.

So this means that rather than being able to reject the claim entirely because of a non-disclosure, the insurer can generally only reject a claim to the extent that that non-disclosure prejudiced their rights.

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So, a workplace safety audit report which shows dangerous defects in common property would always be something that was material to be disclosed to your insurer. But if it was not disclosed the insurer could only reject a subsequent insurance claim to the extent that the information in the report prejudiced the insurer's interest.

For example, if the report indicated 3 unsafe windows, and 4 other trip hazards in the common property, but the insurance claim was for an accident in a poorly lit stairwell the insurer would find it hard to successfully argue that the claim could be denied for non-disclosure of the report.

If the report did mention the poorly lit stair well, then what prejudice has the insurer suffered. This gets more difficult. If the insurer can honestly say that if they had been provided with the report that they would not have insured the building they may be able to reject the claim.

In reality though, in our experience where such a report has been provided to the insurer, they will usually either seek a higher premium from the insured, seek a higher excess from the insured (particularly with respect to the defects identified), or possibly also provide an exclusion for any claims arising out of the notified defects. The insurer may also require the owners to perform certain works to rectify the defect or perceived danger and if those works are not performed cover will be excluded for any incident arising from that defect.

This then becomes the insurer's prejudice pursuant to s 54 of the Act. The insurer must be able to state what they would have done differently if they had been provided with the information which the insured did not provide.

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