

# The AFCA Approach to non-disclosure and misrepresentation

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We have created a series of AFCA Approach documents, such as this one, to help consumers and financial firms better understand how we reach decisions about key issues.

These documents explain the way we approach some common issues and complaint types that we see at AFCA. However, it is important to understand that each complaint that comes to us is unique, so this information is a guide only. No determination (decision) can be seen as a precedent for future cases, and no AFCA Approach document can cover everything you might want to know about key issues.

# 1 At a glance

## 1.1 Scope

The purpose of this document is to explain AFCA's approach to complaints from consumers when an insurer denies a claim on the basis the complainant failed to disclose (non-disclosure), or misrepresented, a matter.

## 1.2 Who should read this document?

- Financial firms, consumers and consumer representatives who have a complaint at AFCA that includes non-disclosure or misrepresentation.
- Anyone who wants to understand how AFCA applies legal principles, industry codes and good industry practice when considering complaints where the issues of non-disclosure or misrepresentation are raised.

## 1.3 Summary

This document aims to provide:

- an introduction to some of the main issues
- examples of key documents
- previous decisions issued by AFCA
- innocent / fraudulent non-disclosure and misrepresentation decision guide.

# 2 In detail

## 2.1 Innocent non-disclosure

This applies to disputes where the insurer says the complainant failed to disclose a matter but does not allege this was done fraudulently.

For the sake of convenience, this approach presumes the complainant is the insured.

Sections 21, 21A, 21B, 22 and 28 of the *Insurance Contracts Act 1984* (Cth) (the Act) apply.

To refuse payment of a claim on this basis, the insurer must show:

- 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.
- If the policy was an 'eligible contract of insurance'<sup>1</sup>:

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<sup>1</sup> These are policies for motor vehicle, home building, home contents, travel, consumer credit or personal accident and sickness.

- > The insurer asked the complainant a specific question (if the non-disclosure relates to when the policy was first issued); or
- > The insurer (if the non-disclosure relates to the policy being renewed) 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
- > The complainant knew the correct answer and a reasonable person in their circumstances would have disclosed this information
- If the policy is not an ‘eligible contract of insurance’:
  - > 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
- The extent of the insurer’s prejudice by the complainant’s failure to disclose this information.

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)

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

### Other considerations

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.

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

## 2.2 Innocent misrepresentation

This applies to disputes where the insurer says the complainant made a misrepresentation but does not allege this was done fraudulently.

Often this issue will arise alongside non-disclosure. This is because the same set of facts can give rise to both grounds.

Sections 23, 24, 26, 27 and 28 of the Act apply.

To decline a claim on this basis, the insurer must 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.

This part of the approach is the same as innocent non-disclosure. That is, the insurer would normally show it would have not have issued the policy if the misrepresentation had not occurred 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).

### Other considerations

Even if the insurer can establish all this, AFCA will 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 (section 26(1)), or the insurer's question was ambiguous (section 23).

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.

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 consider any unusual circumstances that may arise in these matters.

### **2.3 Fraudulent misrepresentation and fraudulent non-disclosure**

There are times when an insurer says the misrepresentation or non-disclosure was fraudulent.

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, this is not fraud.

Given the seriousness of the allegation, AFCA would expect the insurer to provide clear and convincing evidence to establish this.

If the misrepresentation or non-disclosure is fraudulent, then 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.

In limited cases, voiding the policy may not be fair. This may be when the information not disclosed made little difference to the insurer's position. For example, it would have simply charged a slightly higher premium or imposed a condition that made no difference to its liability.

In those cases, AFCA will consider whether it is fair in all the circumstances for the claim to be denied. This requires consideration of at least the following factors:

- 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).

This is also consistent with section 31 of the Act. Whilst AFCA is not a court, it is required to do what is fair in all the circumstances. AFCA considers it is appropriate to have regard to this provision given it aligns closely to our purpose.

### **2.4 Important things to note**

#### **A person is only required to disclose what they know**

That is, 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.

### **Most general insurance policies operate for one year and are renewable**

Each renewal is a separate contract of insurance. Therefore, it is important to identify which period of insurance is relevant to the non-disclosure or misrepresentation. This includes ensuring the non-disclosure or misrepresentative 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.

### **An insurer is not legally required to clearly inform the complainant of their duty of disclosure at each renewal**

This is 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).

Having said that, AFCA may consider it unfair if the information was provided a long time ago.

### **Prejudice**

If the insurer shows that their prejudice is that no policy would have been issued, then 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.

### **'A reasonable person in the circumstances'**

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. It is a matter of looking at a reasonable person in the same circumstances as the complainant.

## **2.5 What information does AFCA need?**

### **From the insurer**

AFCA may ask the insurer to provide:

- 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 provide:

- 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?

## 3 Context

### 3.1 Previous determinations

The examples below are based on determinations by one of AFCA's predecessor schemes, the Financial Ombudsman Service. While previous determinations (by AFCA or by its predecessor schemes) are not binding precedents, where relevant they will inform AFCA's approach to an issue.

Case	Details
454454	<p>The duty of disclosure only extends to something which, at the time for disclosure, a person has in his or her consciousness – or else something which exists in some record or other source of information – which the person knows about and to which the person has access.</p> <p>The complainant’s medical condition was such that he did not know about the licence suspensions (or records of licence suspensions) at the time of the application. It follows that he did not breach his duty of disclosure.</p>
475974	<p>AFCA did not accept a reasonable person in the complainant’s circumstances would have interpreted the insurer’s question to only apply to provisional or full licenses. The question contains no such qualification. Instead, given the nature of the cover purchased and the questions asked, a reasonable person in the complainant’s circumstances would have answered yes.</p> <p>Therefore, the complainant failed to comply with her duty of disclosure.</p>
483309	<p>The complainant said they believed their criminal history was not relevant to car insurance. That is not sufficient. AFCA was satisfied that a reasonable person in the complainant’s circumstances would know that their convictions for theft and arson were relevant to an insurer deciding to offer or renew insurance. The questions asked by the insurer show that it was interested specifically in arson and theft and AFCA found that the question was asked in the initial application for insurance. In any case, it is obvious that an insurer of a car will be interested in a recent criminal history of offences concerning deliberate property damage, and that any insurer will be interested in recent offences involving dishonesty such as theft.</p> <p>AFCA was satisfied that the complainant was obliged to disclose the arson conviction on inception and renewal, and that they were obliged to disclose the theft conviction on renewal. By failing to do so the complainant breached their duty of disclosure.</p>
439599	<p>The insurer provided a copy of the complainant’s policy schedule held with a different insurer. That policy schedule was raised with the insurer and provided to the complainant when it was quoting the insurance. That certificate of insurance revealed the complainant was asked about their driving history and had failed to disclose their relevant driving history to that insurer.</p> <p>AFCA did not accept the complainant was confused or misled with respect to the matters to be disclosed and accepted, based on the information</p>



Case	Details
	<p>available, that the complainant intentionally failed to disclose his relevant license history.</p> <p>In the circumstances AFCA accepted that the non-disclosure / misrepresentation was fraudulent and the insurer was entitled to void the contract.</p>

### 3.2 References

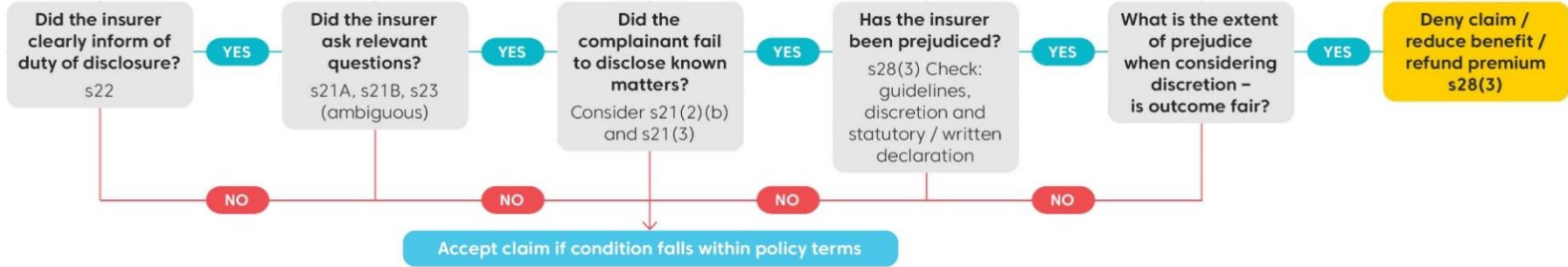
Term	Definition
Complainant	a person who has lodged a complaint with AFCA
Financial firm	a financial firm such as an insurer, who is a member of AFCA

### Useful links

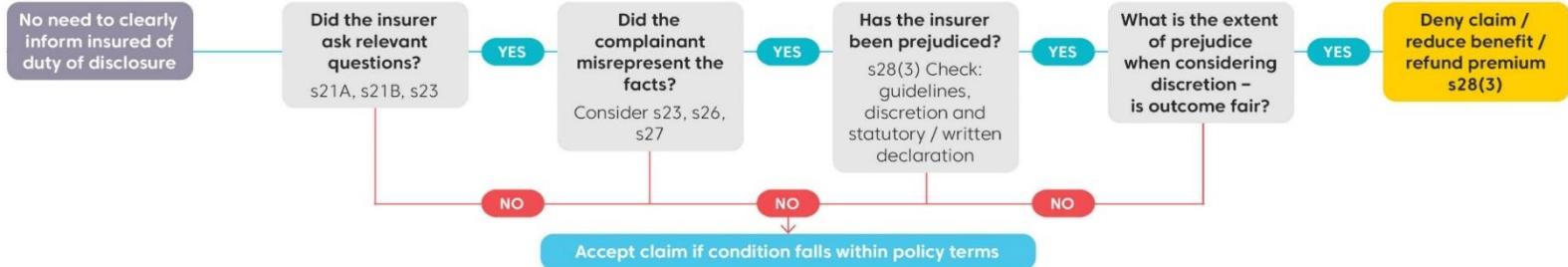
Document type	Title / Link
<a href="#">Insurance Contracts Act</a>	This Commonwealth statute can be found here: <a href="https://legislation.gov.au/Details/C2019C00115">legislation.gov.au/Details/C2019C00115</a>
<a href="#">Austlii</a>	Austlii is a free resource that contains a full extract of most of the judgments issued in Australia <a href="https://austlii.edu.au">austlii.edu.au</a>

# Appendix A - Innocent / fraudulent non-disclosure and misrepresentation decision guide

## Innocent non-disclosure



## Innocent misrepresentation



## Fraudulent non-disclosure / misrepresentation

