



**Professional
Contractors and Consultants
Australia**

YOUR INSURANCE CLAIM DENIED

NON-DISCLOSURE DISASTERS



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Insurance policies are contracted between the Insurer and Insured on the basis of “utmost good faith”. This means that each party who enters into a contract of insurance has a legal obligation towards the other party to act in good faith.

Section 21 of the Insurance Contracts Act (the Act) requires you to disclose to the Insurer, before a Policy of insurance is entered into, every matter known to you, being a matter relevant to their decision to accept the risk and if so on what terms. The reasonable person test is also applied in the Act which calls for you to disclose any matter which a reasonable person in the same circumstances would be expected to know to be so relevant.

When completing a proposal form to take out insurance both initially and at renewal or advising amendments as circumstances change, Insured's have a duty to disclose every matter that is known to them and relevant to the risk, based on the reasonable person test. The details disclosed then become relevant to the Insurer's decision whether to accept the risk of the insurance and if so on what terms.

If you fail to comply with your duty of disclosure, the insurer may be entitled to reduce its liability under the contract in respect of a claim or may cancel the contract.

Answering proposal questions incorrectly either in error or fraudulently can have detrimental effects. Careful consideration needs to be given to answering typical questions in an Insurance proposal form:

1. Have you ever had a Professional Indemnity Insurer:

- (a) Decline a proposal? Yes No
- (b) Impose special terms? Yes No
- (c) Decline to renew your insurance? Yes No
- (d) Cancel your insurance? Yes No

Whilst you may not be able to answer 'no' to all questions, you may be able to demonstrate a valid rationale as to why a declination or cancellation occurred which the next Insurer may find acceptable. Further a proposal may have been declined or special terms imposed due to your occupation being outside an insurer's underwriting guidelines or you may have been a start-up business at the time without experience required by the Insurer which may have been gained since. Not all reasons to your answer will necessarily be negative in the minds of the Insurers looking to hold the risk.

2. In the past 10 years:

Has any Claim been made, or has negligence been alleged, against any entity or individual to be insured by this insurance (including any prior corporate entity and any of the present or former Principals), or have any circumstances which may give rise to a claim against any of these been notified to insurers?

Yes No

If 'Yes' please provide details below

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Failure to provide claims circumstances even if they occurred some time ago can present a problem. If you have a subsequent claim and the current Insurer investigates and determines that there had been other significant claims they may seek to reduce their liability or void the policy on the basis that they wouldn't have taken the risk of Insuring you in the first place. Alternatively, if known they may have taken the option to impose conditions or exclude claims arising out of a scenario.

Case study

An Insured, John & Son Engineers failed to notify the Insurer of two key facts. One - that they had been involved in a Coronial Inquiry that investigated a fire and two - they had also received legal letters of demand in relation to the matter during 2013-2014.

John & Son then sought indemnity from their Insurer under their 2016-2017 Professional Indemnity policy when they were joined as a respondent in the Federal Court in 2016. Whilst John & Son Engineers held Insurance with the Insurer prior to 2012 they did not have policies after this time and had a significant gap in cover before taking out Insurance again in 2016. When the Insurer's solicitors investigated the claim, they found that the first knowledge of the claim was not in 2016 when the Federal Court proceedings were issued but back in 2013 when they received letters of demand which were even responded to by John & Son Engineers denying the allegations and advising that they did not have Professional Indemnity Insurance in place. They were also involved in the Coronial Inquiry which should have been notified to Insurers at the time in case further action arose from it which did happen in this scenario.

In their denial of the claim, the Insurer stated that a claim is defined as any originating process or written or verbal demand from a third party seeking compensation against you. The policy excludes claims known to you at the inception of the policy. The claim for indemnity is therefore excluded.

Section 28 of the Act provides that if an intending Insured, fails to comply with their duty of disclosure, the Insurer is to be placed in the same position it would have been had the intending Insured complied with the duty of disclosure. Had the Insured complied with their duty of disclosure, the Insurer would either have declined to insure or limited the insurance cover to exclude any Claim(s) relating to the fire-related claim.

Therefore, whilst the Insurer allowed the Insurance policy to continue, they denied liability in respect to any outcome of the Federal Court Proceedings and John & Sons Engineers then needed to defend themselves in this scenario. Insurers won't provide cover for known circumstances, the only scenario where an Insurer may look at providing cover for a known claim is where you have had continuous cover for a policy and they would have picked up the claim anyway but for the late disclosure. This is legislated under section 54 of the Act.

If you have been a Director of other companies, it is necessary to disclose prior claims also, even if the company is no longer operational.

3. Are there any circumstances not already notified to Insurers which may give rise to a Claim against any entity or individual to be insured?

Yes No

If 'Yes' please provide details below

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Due to the 'claims made' nature of Professional Indemnity policies it is important to disclose a known circumstance before the end of a period, otherwise you may be without cover and this is particularly important where you change broker or where you agree with your present broker to change Insurers.

Case study

Architects JM Lucy Pty Ltd changed their Insurance broker for the 2015-2016 period. No mention was made of current or prior claims or circumstances on the proposal form completed for the new broker to obtain quotations and subsequently place cover on their behalf with a new Insurer, Versatile Insurance. In 2015 proceedings were issued against JM Lucy Pty Ltd. They notified their current Insurer, Versatile Insurance via the new broker and solicitors began to act on their behalf. The solicitors were to represent JM Lucy Pty Ltd at mediation. All documents were submitted to the solicitor to review. JM Lucy Pty Ltd had in fact been issued with a letter of demand back in 2013 from the Third Party alleging breach of copyright of their house plans. JM Architects were advised that the 2015-2016 policy would not provide cover for the proceedings due to the known circumstances. The Professional Indemnity broker then needed to investigate if their client had in fact notified a previous Insurer. Fortunately, it was ascertained from the previous Insurers claims department that they had notified the matter. The problem however with not notifying the new broker/Insurer at the outset meant that the previous Insurer needed to appoint their own solicitors mid-term and take over the running of the matter late. The previous Insurer was not able to utilise the current Insurers solicitors as they were not on their panel of preferred solicitors. Whilst this was a frustration to the Insured, they understood that had the matter been disclosed and notified to the correct Insurer at the outset, this situation of establishing a relationship with new solicitors part way through the proceedings could have been avoided. Each Insurer has the contractual right to appoint solicitors from their own panel and take over the matter as they consider appropriate to best defend both the Insured and the Insurer's interests.

4. Has any Principal or staff member ever been subject to disciplinary proceedings for professional misconduct?

Yes No

If 'Yes' please provide details below

Name of Practice and Principal:

Nature of problem:

Amount paid and/or outstanding:

This question requires disclosure no matter how long ago the disciplinary proceeding occurred and whether or not it relates to your current occupation.

Case Study

Building Surveyor Georgina Rain was joined at VCAT as third respondent in respect to building defects related to weatherproofing, installation of non-compliant external cladding system and departures from the Building Permit documents. Georgina had a Professional Indemnity Insurance policy for the 2014-2015 period. Insurers appointed panel lawyers and when they were considering indemnity under the policy they investigated and found that the Victorian Building Authority Practitioners Disciplinary register list showed that Georgina had been deregistered of her Building Surveyor Registration by the Board in 2012. She had also been suspended for a 12 month period on a previous occasion. Georgina was not registered to practice in her occupation even though she continued to do so and she subsequently completed two proposal forms for the 2013-2014 and 2014-2015 period and answered 'No' to the question 'Has any Principal or staff member ever been subject to disciplinary proceedings for professional misconduct?' Given the circumstances outlined, Georgina's actions were considered to be a 'Misrepresentation' to Insurers under section 28 1(b) of the Insurance Contracts Act. Further as the Disciplinary Proceedings were known by the Insured and her registration had been cancelled prior to entering into the two Professional Indemnity contracts, there was a duty to disclose these matters to the Insurers as being relevant factors to the Insurer to accept the risk. The failure to disclose combined with the misrepresentation within the proposal form was considered to be 'fraudulent non-disclosure' under s 28(2) of the Act.

Insurers confirmed that had they known of her deregistration they would not have accepted the risk for the 2013-2014 and 2014-2015 periods and they are entitled to void the policies for both periods. Full refunds were given and the panel solicitors ceased to Act for Georgina at VCAT. She was uninsured and left to defend herself!

As you can see from these claims examples, the duty of utmost good faith extends to both the Insurer and Insured. The statute and reasonable person test applies to both parties and the success of the Insurance contract requires honesty and full disclosure. Don't risk your claim being reduced or your policy being cancelled or voided. Ensure you disclose to safeguard your chances of cover going forward - you have a moral and legal obligation to do so.



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